JD–105–16
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

W.B. MASON CO., INC

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25

Cases 01–CA–161120
01–CA–161428
01–CA–161697
01–CA–162391
01–CA–162884
01–CA–177383

Elizabeth Vorro and *Alyssa Rayman-Read, Esqs.,*
for the General Counsel.
Frederick Schwartz and *Michael Wissa, Esqs.,*
for the Respondent.
Renee Bushey, *Esq*.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Boston, Massachusetts, on June 13-17, and June 21, 2016. The International Brotherhood of Teamsters, Local 25 (the Union) filed the charge in 01-CA-161120 on October 1, 2015, and an amended charge on March 30, 2016. The charge in 01-CA-161428 was filed on October 6, 2015, and amended on March 30, 2016. The charge in 01-CA 161697 was filed on October 9, 2015. The charge in 01-CA-162391 was filed on October 21, 2015, and amended on April 5, 2016. The charge in 01-CA-162884 was filed on October 28, 2015, and amended on March 30, 2016. The General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing on April 29, 2016. On May 24, 2016, the General Counsel issued an amendment to the consolidated complaint.

On June 1, 2016, the Union filed the charge in 01-CA-177383. On June 14, 2016, the General Counsel issued an order further consolidating cases and further amended consolidated complaint (the complaint). On June 15, the General Counsel moved to consolidate the allegations in 01-CA-177383 with the allegations in the consolidated complaint. The Respondent had no objection to the motion and I granted it. The Respondent filed an answer denying the labor practice allegations in the complaint.

As finally amended, the complaint alleges that from approximately September 28 through October 15, 2015, the Respondent, through various supervisors, violated Section 8(a)(1) of the

Act by: promising employees to remedy various problems; promising employees promotions, raises and transfers; threatening employees with a loss of direct access to it; informing employees it would be futile for them to select the Union as their bargaining representative; interrogating employees about their union activities; threatening employees with a loss of benefits and unspecified reprisals by telling employees that they would start from scratch and lose everything if they selected the Union as their bargaining representative; creating an impression of surveillance regarding the union activity of employees; telling employees that their annual wage increase would be withheld and blaming it on the Union; and telling employees that granting their annual wage increase was conditioned on withdrawal of the Union's representation petition and unfair labor practice charges.

The complaint also alleges that during the period from September 29, 2015, through October 9, 2015, the Respondent violated Section 8(a)(3) and (1) of the Act by: granting benefits to employees by improving the efficiency of its warehouse, delivery routes and truck loading, and assisting employees in the performance of their duties, providing refreshments to employees on a frequent basis and granting child dependent care benefits to a driver; laying off its employees Kirby Chery, Elton Ribeiro and Jason Cobbler; and suspending and discharging its employees Oscar Castro, Marco Becerra, and Sean Brennan.

The General Counsel contends in the complaint that the unfair labor practices committed by the Respondent are serious and pervasive and warrant the issuance of a remedial bargaining order. Consistent with that position, the General Counsel contends that on September 28, 2015, the Union enjoyed majority support among the employees in an appropriate unit and orally requested that the Respondent recognize and bargain with it. The General Counsel alleges that by failing to recognize and bargain with the Union since September 28, 2015, the Respondent has violated Section 8(a)(5) and (1) of the Act.

The complaint further alleges that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by on or about December, 2015, withholding and annual wage increase from employees and on or about June 1, 2016, granting employees and annual wage increase. Finally, the complaint alleges that, about June 1, 2016, the Respondent, through Carlos DeAndrade, interrogated employees about their union activities [1]

On September 28, 2015, the Union filed a petition in Case 01-RC-160788 seeking to represent the Respondent's supply drivers and supply driver helpers at its Boston, Massachusetts facility. Thereafter, the parties entered into a Stipulated Election Agreement which set forth the appropriate unit as follows:

> All full-time and regular part-time time supply drivers, supply drivers helpers, and supply shuttle drivers employed by the Employer at its Summer St., Boston,

[1] On October 3, 2016, I was administratively advised by counsel for the General Counsel that a petition for an injunction under Section 10(j) of the Act had been filed regarding the allegations of the complaint with the United States District Court for the District of Massachusetts. I take administrative notice of the fact that the 10(j) petition, Case 1:16-cv-11934-NMG, was filed on September 26, 2016, and is presently pending before District Court Judge Nathaniel Gorton. Since a 10(j) petition is pending, I have expedited the decision in this case to the extent possible pursuant to the provisions of Section 102. 94(a) of the Board's Rules and Regulations.

Massachusetts, facility, but excluding all other employees, managers, guards, and supervisors as defined in the Act.

The eligibility list submitted by the Respondent for the payroll period ending September 25, 2015, contained the names of 42 unit employees. (Jt. Exh. 1.)

As noted above, in early October 2015, the Union filed a series of unfair labor practice charges and, on October 19, 2015, requested the Regional Director to block the election scheduled for October 22, 2015. The Regional Director granted the Union's request and the representation case proceeding remains blocked by the instant unfair labor practice proceeding

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Massachusetts corporation with its principal place of business located in Brockton, Massachusetts (the Brockton facility), and a place of business in Boston, Massachusetts (the Boston facility), where it is engaged in the sale and delivery of office supplies and related products. Annually, in conducting its operations, the Respondent sells and ships from its Brockton facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent is a nationwide office products dealer with its headquarters in Brockton, Massachusetts. The Respondent's Boston, Massachusetts facility contains the following departments: order fulfillment, purchasing, sales, customer service, technology, printing and forms, and a warehouse, which includes distribution and delivery functions. An important component of the Respondent's delivery operations is its same-day delivery service. This service

[2] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds, 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

provides that customers, who order eligible products by 11a.m, will have the products delivered that same day. None of the Respondent's primary competitors provide such a service.

The employees involved in this matter are supply drivers (drivers)[3] and supply driver helpers (helpers) who are responsible for delivering the Respondent's products to customers throughout the greater Boston area. Each driver is assigned a particular route which he performs on a regular basis. Helpers are assigned to assist drivers to work on particularly busy routes. Drivers and helpers arrive at the Boston facility at approximately 6:30 a.m. After clocking in, drivers check to make sure the trucks are properly loaded and then leave the facility for the morning deliveries. After the morning deliveries are completed, drivers return to the Boston facility and take a lunchbreak. During the lunchbreak, loaders load the trucks with products ordered by customers for same-day deliveries. After the trucks are loaded, the drivers leave the facility to deliver the same day deliveries. Upon the completion of their routes the drivers and helpers return to the facility and clock out.

Christopher Meehan is the Respondent's chief operating officer and is responsible for the Respondent's daily operations nationwide; he has an office in the Boston facility and spends approximately 60 percent of his time there. Michael Meath is the Respondent's vice president of distribution and is present at the Boston facility on a weekly basis. Joel Burkowsky is the Respondent's director of human resources and his office is located in Brockton, Massachusetts. Laura Sullivan the Respondent's senior human resource manager and her office is located at the Boston facility. Timothy Hallinan is the human resources manager at the Boston facility. Anthony Capello is the warehouse manager at the Boston facility. Carlos DeAndrade is the Boston branch manager and is responsible for sales and distribution at that facility. Marianne McIntyre, the transportation manager at the Boston facility, supervises supply deliveries. "Goldstar" supervisors are the first line supervisors for supply drivers and helpers.

In August 2015, the Respondent acquired New England Office Supply (NEOS). This acquisition increased the volume of business substantially for the Boston facility, in addition to its facilities in, Brockton, Woburn, and Worcester, Massachusetts, and Cranston, Rhode Island. The additional customers obtained as a result of this acquisition increased the work load of the Boston drivers and helpers.

The Union's Organizing Campaign

In March 2015,[4] driver Oscar Castro had spoken to several other drivers, including Robert Coppola, regarding working conditions at the Respondent's Boston facility, including the heavy workload of the drivers and helpers. Castro then called union organizer Christopher Smolinsky and discussed with him the desire of some of the drivers and helpers at the Boston facility to form a union and agreed to meet with Smolinsky on March 14, 2015. On that date, Smolinsky met Coppola and Castro and discussed with them beginning an organizing campaign among the drivers and helpers at the Respondent's Boston facility. Both Castro and Coppola signed union authorization cards at this meeting.

[3] The Respondent also employs furniture drivers at its Boston facility, who are separately supervised and are not part of the petitioned-for unit.

[4] All dates are in 2015, unless otherwise indicated.

After this initial meeting, Castro and Coppola spoke to other drivers about their interest in having a union to represent them. On May 23, 2015, Smolinsky met with Castro, Coppola and five other drivers. At that meeting, four employees signed authorization cards. At a meeting held at Coppola's house on July 25, 2015, 14 employees signed an attendance sheet that the Union maintained and Smolinsky credibly testified that several additional employees were at the meeting but did not sign the attendance sheet. 10 employees signed authorization cards at this meeting. Smolinsky gave blank authorization cards to Coppola, Castro, John Edwards, Claudio Brandao and Kenny DeAndrade in order for them to solicit other employees to sign cards. On August 3, Smolinsky met with Coppola, Castro, Robert Froio, and Justin Cohane and distributed to them literature regarding employees' rights under the Act.

On September 13, Smolinsky conducted a meeting at the Union's office in Charlestown, Massachusetts, at which 18 drivers and helpers attended. At this meeting, all 18 employees who attended were photographed as a group (GC Exh. 19) and Smolinsky informed those in attendance that the photograph would be presented to the Respondent along with the Union's petition for an election. On September 16, approximately 32 drivers and helpers attended a meeting with Smolinsky at the Westin hotel in South Boston. All 32 employees in attendance at the meeting posed for a group photograph (GC Exh. 20). On September 25, Smolinsky met with eight employees, who were in a leadership role in the union movement, including Castro, Brandao, Froio, Edwards, and Sean Brennan. At this meeting, a decision was made to go ahead and file a petition for an NLRB election.

On September 28, Smolinsky and Robert Aiquier, the Union's business agent, went to the Respondent's Boston facility. When he entered the facility, Smolinsky told an unidentified individual that he would like to meet with Meehan, Meath, or Carlos DeAndrade. Warehouse manager Anthony Capello then met with Smolinsky and Aiquier and they informed him that they were representatives of the Union. Smolinsky told Capello that the Union represented a majority of the Respondent's drivers and helpers and asked for voluntary recognition. Capello replied that he could not make that decision and informed him that DeAndrade was busy and that neither Meehan nor Meath was present at the facility. Smolinsky then gave Capello a copy of the representation petition that the Union was going to file with the NLRB, a union flyer with the two group photographs of employee supporters, and his business card. The same day, Smolinsky filed the Union's representation petition with the NLRB Regional Office.

On September 29, approximately 20 to 25 drivers and helpers conducted a rally outside of the Respondent's Boston facility in the morning before the start of the workday. Smolinsky was present along with approximately 10 to 15 other individuals, who were not employed by the Respondent. The group marched in a circle changing "What do we want, a contract, when do we want it, now." Some of the individuals carried signs indicating they wanted the Respondent to extend recognition to the Union and enter into a contract. Becerra carried a sign stating "Stop the war on workers" that had a Teamsters Local 25 logo on it. Meehan, Meath, Carlos DeAndrade, and Hallinan were present in the immediate vicinity where the rally took place.

Shortly after the representation petition was filed, the Respondent hired Michael Penn, a labor consultant, to assist in its campaign against the Union. According to the uncontradicted testimony of Penn, he began to hold a series of four mandatory meetings with the supply drivers and helpers that began on October 6. The supply drivers and helpers were split into four groups

and each group attended two meetings per week. The meetings were held at 6 a.m. and 4:30 p.m. Tuesday through Thursday. Penn maintained sign in sheets reflecting the employees who attended each meeting. At times, the meetings could last for approximately 3 hours because of questions from employees. At the first series of meetings, Penn held, he spoke generally about the National Labor Relations Act, the process by which a union comes to represent employees and union organizing tactics. The first series of meetings was concluded on October 7.

The second series of meetings discussed the International Brotherhood of Teamsters constitution, the bylaws of Teamsters Local 25 and the LM-2 reports filed with the Department of Labor by both the International Union and Local 25.These meetings began on October 8 and the last meeting was held on October 9.

In the third series of meetings Penn described the collective-bargaining process through the use of a power point presentation. This series of meetings began on October 13 and concluded on October 14. The record does not indicate the topic of the fourth series of meetings.

In addition to the meetings conducted by Penn to dissuade employees from supporting the Union, in approximately the first week of October, the Respondent openly displayed its opposition to the union's organizing campaign by posting three 3 ft. by 6 ft. antiunion posters in the loading dock where the drivers' trucks were loaded. According to the uncontradicted and credited testimony of Becerra, one of the posters had a picture of Teamsters officials with a slogan indicating "2016 indicted for racketeering." The bottom of the poster indicated "Someone might be okay with thugs, but not us." with the W.B. Mason logo located beneath it. The second poster also contained a reference to the Union and stated that "Some might be okay with thugs but not us." and also had the W.B. Mason logo on it. The third poster was a cartoon containing a reference to individuals associated with Teamsters Local 25 being indicted for racketeering.

On October 15, Coppola, Pina, and Edwards presented a petition to Smolinsky signed by 30 employees, requesting that the Union withdraw its representation petition and unfair labor practice charges. As noted above, on October 19, the Regional Director granted the Union's request to block the election scheduled for October 22, 2015.

The Alleged 8(a)(1) Violations in late September and early October 2015

Paragraph 7 of the complaint alleges, in part, that the Respondent violated Section 8 (a)(1) of the Act by promising employees it would remedy various problems if they rejected the Union through Carlos DeAndrade, on September 29, 2015, and Laura Sullivan, on September 30, 2015. In a closely related allegation, paragraph 9 alleges, in part, that the Respondent violated Section 8(a)(1) by soliciting employee complaints and grievances, and promising employees increased benefits and improved terms and conditions of employment if they rejected the Union through Laura Sullivan, on September 30, 2015, and Carlos DeAndrade, on October 1 and 15, 2015.

Paragraph 10 of the complaint alleges that in early October 2015, the Respondent, by an unnamed manager, threatened employees with loss of direct access to the Respondent if they selected the Union as their bargaining representative in violation of Section 8(a)(1).

Paragraph 11 alleges that the Respondent, by an unnamed manager, on September 28, and by Michael Meath on October 1, by telling employees it would not work with the Union and that it would not have a union at its Boston facility, informed employees it would be futile for them to select the Union as their bargaining representative in violation of Section 8(a)(1).

Paragraph 12(a) alleges that about September 28, 2015, the Respondent, through Sullivan, interrogated employees about their union activities in violation of Section 8(a)(1).

Paragraph 14 alleges that about September 28, 2015, Respondent, by Michael Meath, by telling employees that the Respondent would find out who started the Union, created an impression among employees that their union activities were under surveillance in violation of Section 8(a)(1)

Current employee Robert Froio testified pursuant to a subpoena issued by the General Counsel. Froio testified that shortly after the Union's representation petition was filed, he had a conversation with Carlos DeAndrade while Froio was in his truck. DeAndrade approached Froio and asked him what the issues and the problems were with the drivers. DeAndrade further said that he had an open door and that the employees could always come to see him.

Froio also testified that he spoke to Laura Sullivan on the loading dock shortly after the petition was filed and the rally was held at the Respondent's facility. Sullivan told him that she had just returned from vacation when those events occurred and that she did not know what was going on. Sullivan said that she was unaware that there were a lot of problems with the drivers and asked him if he knew what was going or knew what the problems were.

Claudio Brandao, a former supply driver who voluntarily left his employment with the Respondent in December 2015, testified that on September 29 or 30, he attended a meeting, along with other drivers, that was conducted by Carlos DeAndrade. Hallinan, and another manager who Brandao did not know, were also present. Brandao testified that Carlos DeAndrade read a letter to the employees that he had received from the NLRB advising the Respondent that the Union had filed a petition for an election. DeAndrade then told the employees that if they had any questions or if they needed anything, to come and see him.

Brandao testified that within approximately a week after the first meeting, he attended another meeting that was conducted by Carlos DeAndrade. Hallinan and Sullivan were also present. During this meeting, Carlos DeAndrade passed around to the drivers and helpers a Boston Herald newspaper that had a picture "of the guys from the Union." DeAndrade said that "these were the thugs" that were attacking employees. DeAndrade added that the Respondent would not work with the thugs. DeAndrade further stated that if the Union came in, "everything will change in the company." DeAndrade added that the employees would have no voice and that "everything has to go to a second party." (Tr. 566.)

Alleged discriminatee Castro testified that on the day the Union presented the election petition to the Respondent, he attended a meeting that was held in the conference room at the Boston facility after he returned from his route. The meeting was attended by 10 to 12 drivers and helpers and Carlos DeAndrade, Meehan, Hallinan, and Sullivan were present for the

Respondent. At this meeting, DeAndrade asked the employees why they were doing this and why it was happening at that time. Meehan also asked the drivers why they were doing this.

The following morning, Castro attended another meeting that the Respondent conducted pursuant to an instruction he received from his supervisor. There were 20 to 22 drivers and helpers present at this meeting that was held in the same conference room. Carlos DeAndrade, Meehan, Hallinan, and Sullivan were present for the Respondent. At this meeting, Carlos DeAndrade said that they wanted the drivers to understand they were trying to fix the routes and give them more help. DeAndrade also said that Respondent had never negotiated with a union or signed a contract.

Kenny DeAndrade[5] is a current employee of the Respondent and testified on behalf of the General Counsel pursuant to a subpoena. Kenny DeAndrade had been an employee of the Respondent for approximately 3 years and, at the time of the hearing, was employed in the Respondent's stamps department. Kenny DeAndrade and been a supply driver for the Respondent at the Boston facility for approximately a year before he transferred to the stamps department in February 2016.

Kenny DeAndrade testified that after he returned from his route and was getting ready to clock out at approximately 6 p.m. on the day the Union presented the election petition to the Respondent, Carlos DeAndrade told him that he needed to speak to him and the other drivers and helpers who were present and asked them to come to the conference room. According to Kenny DeAndrade, Carlos DeAndrade, Hallinan, and either Meath or Meehan[6] were present at this meeting for the Respondent. Carlos DeAndrade said that the Respondent had just found out that the Union was "filing for an election." DeAndrade asked the drivers what was going on and whether the Respondent could do anything to help them. The individual Kenny De Andrade thought may have been Meath, but was actually Meehan, read the election petition, and said that they would find out who did this and that the Respondent had never had a "union in any other departments."[7] (Tr. 204.)

Alleged discriminatee Becerra testified that on Thursday, October 1, Carlos DeAndrade approached Becerra while he was in his truck getting ready to start his morning route. DeAndrade asked Becerra if there were any stops that could be taken off his route in order to

[5] Kenny DeAndrade is no relation to Carlos DeAndrade.

[6] Kenny DeAndrade credibly testified that he could not remember which individual is Meehan and which is Meath and often confused the two. While Kenny DeAndrade's pretrial affidavit indicates that Meath was present at the meeting, I convinced that his testimony at the trial regarding his confusion as to the identity of Meath and Meehan is genuine. I find, based on the credited testimony of Carlos DeAndrade and Meath, that Meehan and not Meath was a speaker at this meeting.

[7] Kenny DeAndrade's testimony regarding the individual who he believed to be Meath, but who I find to be Meehan, said about finding out who was behind the election petition, was consistent on both direct and cross-examination. My finding regarding what Meehan said about the Respondent's prior history with unions is based upon Kenny DeAndrade's cross-examination testimony. On direct examination, DeAndrade testified that Meehan stated that "They never had any union in any other place. And they will never have a union there or something like that." (Tr. 184.) I find Kenny DeAndrade's direct examination testimony regarding the language used by Meehan on this point to be too equivocal to support a factual finding.

make it easier to manage. DeAndrade gave Becerra his card and Becerra told DeAndrade that he would send him a text message. Previously, DeAndrade had never spoken to Becerra about making his route easier. On Monday, October 5, Becerra sent Carlos DeAndrade a text message indicating that if the customers located at 75 State Street, 53 State Street, and 10 Post Office Square were taken off his route, it would make his route more manageable. The Boston Private Bank, which figures prominently in the narrative regarding Becerra's discharge, is a customer located at 10 Post Office Square.

Alleged discriminate Kerby Chery testified that he worked for the Respondent as a helper at the Boston facility from July 6, 2015, until the first week of October 2015, when he was laid off. Chery testified that after the union rally held on the morning of September 29 at the Respondent's Boston facility, he attended a meeting with some of the Respondent's managers, pursuant to instructions from a goldstar supervisor. Chery recognized Carlos DeAndrade and Hallinan at the meeting but did not know the other managers present. According to Chery, Carlos DeAndrade stated that the Teamsters were not good for the Respondent or the employees. DeAndrade further stated that the Teamsters were thugs and would try to swindle the employees out of their money. DeAndrade added that it was an unfortunate situation but that they would work through it together.

Carlos DeAndrade testified that he attended a meeting that the Respondent conducted with drivers and helpers on the evening of September 28. DeAndrade testified that Meath, Burkowsky, Hallinan, and Meehan were also present. According to DeAndrade, only Meehan spoke at the meeting. Meehan read from a statement and said that the Respondent had received a petition from the drivers to form a union "and that was essentially it." DeAndrade denied that anyone from the Respondent stated at the meeting that the Respondent would never have a union.

Carlos DeAndrade further testified that, while he could not recall the date, he believed that he asked Becerra if there were any challenges on his routes with regard to any particular buildings that would make the route more manageable at some point. DeAndrade specifically denied, however, asking Becerra if he could help him make his job easier or that he gave him his business card. He also denied that Becerra ever indicated to him that he needed help with deliveries to Boston Private bank, which, as noted above, is a customer located at 10 Post Office Square. DeAndrade's testimony does not contain a specific denial of the above noted conversations that Froio and Brandao testified that they had with him.

Sullivan generally denied that she discussed the union campaign with any driver or helper. Sullivan specifically denied she asked any drivers or drivers helpers in September or October 2015 to tell her what the problems were. Sullivan could not recall, however, if she told any employees that if they told her what the issues were, she could help solve their problems.

Meath testified that he attended four meetings between the Respondent's managers and the drivers and helpers with subject of the Union's petition were discussed. According to Meath, meetings were conducted by Carlos DeAndrade and Meehan. Meath denied that he spoke at any of these meetings. Meehan did not testify at the trial.

In considering the complaint allegations noted above, I credit the testimony of Froio in all respects. As noted above, at the time of the hearing he was a current employee who testified on behalf of the General Counsel pursuant to a subpoena. Froio appeared uncomfortable in testifying in a manner adverse to the Respondent's interest, yet his testimony was clear and cohesive. I further note that as a current employee who testified against the interest of the Respondent, it is unlikely that Froio's testimony is false. The Board has noted that when employees testify in a manner which contradicts statements by their supervisors, it is likely to be particularly reliable, since such witnesses are testifying adversely to their own economic interest. *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1 fn. 2 (2014); *Bloomington-Normal Seating Co.,* 339 NLRB 191, 193 (2003). See also *Flexisteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). I also found Kenny DeAndrade to be a credible witness as he demonstrated a sincere desire to testify truthfully. In addition, at the time of the hearing, he was employed by the Respondent. As noted above, as a current employee of the Respondent, it is unlikely that his testimony adverse to the Respondent's interest is false. I found the testimony of Becerra, Castro and Brandao regarding these issues to be credible, as there demeanor reflected certainty regarding the issues they testified about and their testimony contains sufficient detail to be reliable. I also found Chery's testimony to be credible but I find that nothing in his testimony supports any complaint allegations.

I do not find the testimony of the Carlos DeAndrade and Sullivan to be as reliable as that of the employee witnesses and do not credit it to the extent it conflicts with their testimony. Sullivan's testimony was somewhat vague and she appeared uncertain regarding her denial of the statements attributed to her by Froio. I find that Carlos DeAndrade generally was not a credible witness as he often testified in a manner that appeared to be designed to support the Respondent's position. Specifically with respect to the above noted conversation with Becerra, I find that Becerra's testimony regarding the conversation is more detailed. I found Meath's denial that he spoke at any of the four meetings that he attended between management and the drivers and helpers to be credible.

The Alleged Solicitation of Grievances and Promises and Implied Promises to Remedy Them

The Board has held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizing campaign, coupled with an implied promise to remedy such grievances, violates Section 8(a)(1) of the Act. *Center Service System Division*, 345 NLRB 729, 730 (2005); *Reno Hilton*, 319 NLRB 1154, 1169 (1995); *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994). In *Capitol EMI Music*, the Board noted "[T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved additions expectable for the employees involved." 311 NLRB at 1007. In *Reno Hilton,* supra*,* the Board found that the employer violated Section 8(a)(1) when, during an organizing campaign, its agent told employees that the employees supervisor's office was open at all times, and that they could come in and tell her their complaints and she would listen and help.

In the instant case, I find that, after the Union filed its petition, Carlos DeAndrade informed groups of employees that the Respondent was aware of the petition and asked them if they had any questions or, if they needed anything, to come and see him. Shortly thereafter, Carlos DeAndrade told a group of approximately 20 drivers that the Respondent was trying to fix the routes and give them more help. DeAndrade also approached Becerra and asked him if there were any stops that could be taken off his route in order to make it easier for him. In addition, I find that DeAndrade also approached Froio shortly after the petition was filed and asked him what the issues and problems were with the drivers, and told him that he had an open door and that employees could always come to see him. There is no evidence that prior to the union campaign the Respondent had a regular practice of soliciting employee complaints or grievances. Accordingly, based on the cases set forth above, I find that DeAndrade solicited grievances and impliedly promised to remedy them in violation of Section 8(a)(1) of the Act as alleged in paragraphs 7(a) and 9(b) of the complaint.

With respect to Sullivan's statement to Froio that she was unaware that there were a lot of problems with the drivers and her question to him regarding whether he knew what was going on or what the problems, under the circumstances described above, also constitutes a solicitation of grievances with an implied promise to remedy them. [8]

The Alleged Interrogation

I next address whether Sullivan's statement to Froio constitutes an unlawful interrogation in violation of Section 8(a)(1), as alleged in paragraph 12(a) of the complaint.[9]

In *Intertape Polymer Corp*., 360 NLRB No. 114, slip op. at 1 (2014), the Board noted that, based upon its decisions in *Phillips 66 (Sweeny Refinery)*, 360 NLRB No. 26, slip op. at 5 (2014) and *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom *NLRB v.* Hotel *Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985), it considers the following factors in determining whether questioning an employee regarding their union sympathy is unlawful:

[8] In the General Counsel's brief, counsel for the General Counsel contend that testimony from Froio regarding statements made by Meehan on September 28 constituted the solicitation of grievances and a promise to remedy them in violation of Section 8(a)(1). The brief also contends that the testimony of Castro supports a finding that statements made shortly after the petition was filed made by an alleged manager who did not normally work at the Boston facility, Jeff DePaul, that he was there to try to fix the problems that they were having with their warehouse and giving products loaded for the same day deliveries, similarly violate the Act. The General Counsel's brief also argues that Carlos DeAndrade unlawfully interrogated employees on September 28, by asking employees why they had filed a petition.

There is no complaint allegation regarding matters. At the hearing, I specifically indicated that I would only decide the allegations contained in the complaint and that all amendments to the complaint must be made at the hearing in order to afford the Respondent due process. I further indicated that I would not make any findings regarding alleged unfair labor practices that were raised for the first time in a brief (Tr. 146). Accordingly, I will not address the merits regarding the General Counsel's contention with respect to these incidents. See *Desert Aggregates*, 340 NLRB 289, 292 (2009).

[9] I will address the other interrogations alleged in paragraph 12 of the complaint in later sections of this decision as they are either linked to other alleged unfair labor practices or occurred later in time.

1. Whether there is a history of employer hostility to or discrimination against protected activity;
2. the nature of the information sought;
3. the identity of the questioner;
4. the place and method of interrogation;
5. the truthfulness of the employee's reply.

As set forth above, and as will be further discussed later in this decision, the record in this case clearly establishes that the Respondent was hostile to the Union's attempt to organize its employees at the Boston facility. The nature of the information sought by Sullivan's inquiry was to find out the nature of the problems that the drivers had that caused them to seek union representation. I also note that Sullivan is the highest ranking human resources manager at the Boston facility. These factors all support a finding that the question that Sullivan directed to Froio was coercive. These factors outweigh the fact that Sullivan made the inquiry on the loading dock, rather than in her office, and the fact that the record does not indicate what Froio's response to the question was. Accordingly, I find that Sullivan's questioning of Froio constituted unlawful interrogation in violation of Section 8(a)(1) of the Act.

The Alleged Threat of Loss of Direct Access to the Respondent

Based on Brandao's credited testimony, I find that within a week after the Union presented its representation petition to the Respondent and requested recognition, Carlos DeAndrade told a group of employees that if they selected the Union as a representative, "everything will change in the company" and that employees would have no voice and "everything has to go to a second party."

The Board has held that telling employees they will lose flexibility in their working conditions if they select a union to represent them is an unlawful threat of a loss of benefits in violation of Section 8(a)(1) of the of the Act. *Allegheny Ludlum Corp*., 320 NLRB 484 (1995). The Board has similarly found that threatening employees that there would be stricter enforcement of the rules if they selected a union is violative of Section 8(a)(1*). Fieldcrest Cannon, Inc*., 318 NLRB 470, 495 (1995); *Be-Lo Stores*, 318 NLRB 1, 33 (1995), enfd. in relevant part, 126 F.3d 268 (4th Cir. 1997). In *Pennant Foods Co*., 352 NLRB 451, 461 (2008), the Board held that an employer's statements conveying a loss of existing benefits if a union was selected, without a discussion of the give and take of the collective-bargaining process, is violative of Section 8(a)(1).

I find the Board's decision in *Tri-Cast, Inc*., 274 NLRB 377 (1985), to be distinguishable from the instant case. In that case, the employer distributed a letter to its employees on the day of the election stating, in part:

> We have been able to work on an informal person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.

In that case, the Board found that the above noted statement was lawful in that it explained to employees that when they select a union to represent them, the relationship that

existed between the employees and the employer will not be as before. In doing so, the Board relied principally on the proviso to Section 9(a) of the Act which provides that employees have a right to present grievances to their employer without the intervention of the bargaining representative, as long as adjustment is not inconsistent with the terms of a collective-bargaining agreement, and the bargaining representative has been given an opportunity to be present at such an adjustment.

Carlos DeAndrade's statement in the instant case that the employees would have no voice and everything would have to go to a "second party" clearly implies that selecting the Union as a bargaining representative would result in a loss of policies that are beneficial to employees and that there would be more inflexible policies imposed under a union contract. DeAndrade's statement contained no discussion of the process of collective bargaining as it relates to existing terms and conditions of employment. Rather, DeAndrade impliedly threatened that the selection of the Union would automatically result in inflexible rules that would be applied to all employees. DeAndrade's statement occurred in the context of several other unlawful statements made by the Respondent, and thus the circumstances in the instant case are clearly different from *Tri-Cast, Inc*., supra, where the employer's statement occurred in a context free of other coercive conduct.

On the basis of the foregoing, I find that the Respondent threatened employees with a loss of direct access to it if they selected the Union as their bargaining representative in violation of Section 8(a)(1) as alleged in paragraph 10 of the complaint.

The Allegation that the Respondent Informed Employees of the Futility of Selecting the Union

On September 28, Kenny DeAndrade credibly testified that an individual he thought may have been Meath stated that the Respondent had never had "a union in any other departments." I find, based on the record as a whole, that Meehan rather than Meath made such a statement. Several other witnesses placed Meehan at the meeting, and Kenny DeAndrade testified that he consistently confused Meehan and Meath. On September 29, Carlos DeAndrade told a group of employees that the Respondent had never negotiated with a union or signed a contract.

It is well established that statements by an employer to employees that it would not sign a contract with a union violates Section 8(a)(1), as such a statement conveys to employees the futility of selecting a union as a representative. *Equipment Trucking Co*., 336 NLRB 277, 283 (2001); *Outboard Marine Corp*., 307 NLRB 1333, 1335 (1992).

The statements made by Carlos DeAndrade and Meehan, however, did not convey that the Respondent would not sign a contract with the Union, but rather indicated that the Respondent had not previously negotiated with a union or signed a contract. Thus, the statements did not reflect an intention by the Respondent to refuse to negotiate, but rather indicate that previously the Respondent had not negotiated with a union or signed a contract. There is some evidence that in later meetings conducted by Penn, drivers and helpers were told employees that were represented by a union at one of the Respondent's facility in Connecticut had never obtained a contract. However, I find that the statements made by the Respondent's representatives on September 28 and 29 are, at best, misrepresentations of the Respondent's prior history with unions. Certainly, these statements do not convey the position that the Respondent

would not bargain with the Union in the instant case. Accordingly, I shall dismiss this portion of paragraph 10 of the complaint

As noted above, a few days after the Union requested recognition from the Respondent, at the same meeting that Carlos DeAndrade threatened employees with a loss of direct access to the Respondent, he also passed around a newspaper that contained a photograph of representatives of the Union and told employees that "these are the thugs" that were attacking employees and that the Respondent would not work with "the thugs." I find that this statement of Carlos DeAndrade does convey that the Respondent would not deal with the Union and thus indicates it would be futile for the employees to select the Union as a bargaining representative, under the rationale applied by the Board in the cases cited above. Accordingly, I find that this statement of Carlos DeAndrade's violated Section 8(a)(1) of the Act.[10]

The Allegation that the Respondent Created an Impression of Surveillance

Based on the credited testimony of Kenny DeAndrade, I find that on September 28, Meehan read to a group of employees the representation petition that the Union had served on the Respondent and told the employees that the Respondent would find out who did this.

In determining whether an employer has created an unlawful impression of surveillance of employees' union activities, the Board considers "whether under all the relevant circumstances reasonable employees would assume from the statements in question that their union or other protected activities had been placed under surveillance." *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011); *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), enfd. 181 Fed Appx. 85 (2d Cir. 2006).

As discussed above, the union organizing effort in the instant case was undertaken covertly and the Respondent had no knowledge of the interest of the drivers and helpers with regard to union representation until the Union presented the Respondent with a copy of its representation petition and requested recognition on September 28, 2015. Under these circumstances, I find that, based on Meehan's pronouncement that the Respondent would find out who was behind the filing of the petition, reasonable employees would assume that their union activities were being placed under surveillance. Accordingly, I find that Meehan's statement created the impression of surveillance in violation of Section 8(a)(1) of the Act.[11]

[10] I find that paragraph 11 of the complaint is sufficient to support my finding of an unfair labor practice with respect to this statement. See *Artesia Ready Concrete, Inc.*, 339 NLRB 1224, 1226 (2003).

[11] Paragraph 14 of the complaint alleges that the Respondent, by Michael Meath, on or about September 28, 2015, created the impression of surveillance by telling employees that the Respondent would find out who started the Union. I find that the complaint allegation was sufficient to put the Respondent on notice of the alleged unfair labor practice, pursuant to the principles expressed in *Artesia Ready Concrete, Inc.*, supra. While Kenny DeAndrade confused the identity of Meehan and Meath, the Respondent's own witness, Carlos DeAndrade, correctly identified Meehan and not Meath as a speaker at this meeting.

The Alleged Promises of Promotions, Raises, and Transfers

Paragraph 8 of the complaint alleges that between September 30, 2015, and October 15, 2015, the Respondent by various supervisors, including but not limited to Carlos DeAndrade, Benny Pitre, Joseph Leo, and Ryan Clifford, violated Section 8(a)(1) by promising employees promotions, raises, and transfers if the employees rejected the Union as their bargaining representative.

At the time of the hearing, Damon DeRosa was a current employee of the Respondent who had been employed as a driver for 4 years and testified on behalf of the General Counsel pursuant to a subpoena. DeRosa was an active supporter of the Union who appeared in the group photographs taken by the Union and given to the Respondent on September 28 when it requested recognition from the Respondent. DeRosa also participated in the union rally held at the Respondent's Boston facility on September 29. Thus, it is clear that the Respondent knew of DeRosa's support for the Union.

Throughout his employment with the Respondent, DeRosa lived in Burlington, Massachusetts. The Respondent's facility in Woburn Massachusetts is approximately 5 minutes from his home. It takes DeRosa from between 20 to 60 minutes to travel from his home to the Boston facility, depending upon traffic. DeRosa credibly testified that that on approximately four or five occasions in 2013 in 2014 he made inquiries regarding the Woburn facility, to his supervisors Ryan Clifford and Jaime Rodriguez.

According to DeRosa, approximately 2 or 3 days after the union rally at the Respondent's facility on September 29, admitted Supervisor Clifford spoke to DeRosa in the warehouse before he left the on his route and asked him if he would be interested in a transfer to Woburn. DeRosa declined the offer.[12]

Alleged discriminatee Sean Brennan was employed by the Respondent from March 2014 until his discharge in October 9, 2015. Brennan was an open supporter of the Union appeared in the two group photographs given to the Respondent on September 28 and participated in the rally held at the Respondent's facility on September 29. Brennan is from Woburn, Massachusetts, and has lived there most of his life. He lived in Boston for some period of time and then moved back to Woburn in May 2015. Brennan testified that shortly after moving back to Woburn, in approximately May 2015,, he spoke to admitted Supervisors Clifford and Pitre about transferring to the Respondent's Woburn facility. Both Pitre and Clifford told him that he was "good" where he was. Brennan also testified that he spoke to Supervisor Jaime Rodriquez in July or August 2015 about transferring to the Woburn, facility. Rodriguez told Brennan that he would not like Woburn.

Brennan testified that a couple of days after the union rally, Clifford and Joseph Leo, a manager at the Woburn facility, approached him at approximately 5:30 a.m. in the warehouse and asked him to meet them in the conference room. When Brennan arrived in the conference room, Clifford told him that he would offer him a $3-an hour-raise and a transfer to Woburn if he wanted to go but he had to give them an answer immediately. Clifford told Brennan that he

[12] Clifford did not testify at the hearing and thus DeRosa's testimony is uncontradicted.

would be a driver and would have a number of routes to choose from. When Brennan asked Clifford if he could call his parents to discuss it, he was told "no" and that he had to make a decision immediately. Clifford did not say anything about why the offer was being made at that time. Brennan said that he could make a decision on the spot. The issue of a transfer did not come up again before Brennan was suspended on October 6, and discharged on October 9, 2015.[13]

John Edwards was employed as a driver by the Respondent at the time of the hearing and testified on behalf of the Respondent pursuant to subpoena. Edwards had been employed as a driver since 2010. Initially, Edwards was a supporter of the Union. In addition to signing an authorization card, Edwards solicited approximately two other employees to sign cards and, at the request of Smolinsky, started a text message thread "Still United" for union supporters (Tr. 1715; GC Exh. 25). Edwards testified that on October 5, he had meeting with Carlos DeAndrade the lasted about 4 hours. During this meeting, Edwards future with the Respondent was discussed. At the end of the meeting, DeAndrade asked Edwards whether "if, in the future, he could become a goldstar supervisor, would he want to do that." Edwards replied that he could not answer at that time.[14]

Although Carlos DeAndrade testified at the hearing, he did not testify regarding his discussion with Edwards about the possibility of him being promoted to a goldstar supervisor and thus Edwards' testimony is uncontradicted. Edwards' demeanor clearly reflected that he was reluctant to testify regarding this issue. I find Edwards' testimony on this point to be credible since he was a current employee who testified against the Respondent's interest. In addition, his testimony was corroborated by the text message he sent to other employees the same day as his meeting with Carlos De Andrade.

It is well established that the announcement, promise, or grant of benefits in order to discourage union support is a violation of Section 8(a)(1) of the Act. As the Supreme Court has notably stated, "[T]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964).

In *Hampton Inn New York-JFK Airport*, 348 NLRB 16, 17 (2006), the Board noted:

> In *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. While an election was imminent in that case, the rule set out in *Exchange Parts* is also applicable to promises or conferral of benefits during an organizational campaign but before a

[13] Since neither Clifford nor Leo testified at the hearing, Brennan's testimony on this point is uncontradicted. I find Brennan's testimony regarding this issue to be credible as it is detailed and thorough.

[14] Edwards testimony is corroborated by the fact that on October 5, he sent a text message to other union supporters on the "Still United" thread stating, in part, "I talked to Carlos for 4 hours Fri. all he offered me was to be a goldstar."(GC Exh 25, p.19.)

> representation petition has been filed. E.g., *Curwood, Inc*., 339 NLRB 1137, 1147-1148 (2003), enfd. in pertinent part, 397 F.3d, 548, 553-54 (7th Cir. 2005) (holding that a prepetition announcement and promise to approve pension benefits violated Section 8(a)(1) where the respondent was reacting to knowledge of union activity among its employees.)

Thus, it is clear that the Board applies the *Exchange Parts* rule not only when a representation petition is pending, but also in situations where the employer is reacting to knowledge of union activity among its employees, but before a petition is actually filed. It is also clear that the rule is applied to both the announcement or promise of benefits, *Niblock Excavating, Inc*., 337 NLRB 53 (2001), and the actual grant of benefits, *ManorCare Health Services-Easton*, 356 NLRB 202 222-223 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); *Latino Express, Inc*., 361 NLRB No. 137 (2014), affirming 358 NLRB 823 (2012).

In *Niblock Excavating, Inc*., supra the Board found that the employer's announcement to employees during a representation campaign of increased contributions to the 401(k) plan violated Section 8(a)(1) of the Act. In so finding, the Board noted the following:

> As a general rule, an employer's legal duty in deciding whether to grant improvements while a representation proceeding is pending is to decide that question as it would if the union were not on the scene. *Great Atlantic & Pacific. Tea Corp*., 166 NLRB 27, 29 fn. 1 (1967). In determining whether a grant of benefits is unlawful "the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of benefits." *Lampi, L.L.C.*, 322 NLRB 502 (1996), quoting *United Airlines Services Corp*., 290 NLRB 954 (1988). (Footnote omitted.)

In *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961-962 (2004) the Board found that the employer violated Section 8(a)(3) and (1) by granting employees a wage increase during a representation campaign. The Board summarized the applicable principles in resolving the question of whether a grant of benefits is unlawful as follows:

> An employer, when confronted by a union organizing campaign, must proceed as it would have done if the union had not been present. It is well established that a grant of benefits made by an employer during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election. The employer has the burden of showing that would have conferred the same benefits in the absence of the union. To meet this burden, the employer needs to establish that the benefits are conferred as part of a previously established company policy and that the employer did not deviate from that policy on the advent of the union. (Footnotes omitted.)

Applying the principles expressed in *Niblock Excavating Inc*., supra and *Donaldson Bros Ready Mix, Inc*., to the instant case, the Respondent has failed to establish any legitimate reason

for the timing of the offer of a transfer to DeRosa, a wage increase and transfer to Brennan, and a promotion to Edwards, after the Union had presented its petition for an election and request for recognition to the Respondent on September 28 and filed its petition with the NLRB Regional Office on the same date. Thus, the Respondent has failed to rebut the inference that these offers of benefits were intended to induce employees to abandon their support for the Union. Thus, I conclude that the Respondent violated Section 8(a)(1) of the Act by offering employees, transfers, raises, and promotions.

The Alleged 8(a)(1) Violations Involving Penn

The complaint alleges that Respondent, through Penn, violated Section 8(a)(1) in several respects. In this connection, paragraph 7(c) alleges that Penn, on October 6 and 15, 2015, promised employees that the Respondent would remedy various problems if they rejected the Union. Paragraph 9 (c) alleges that Penn, in October 2015, solicited employee complaints and promised increased benefits and improved terms and conditions of employment. Paragraph 13 alleges that Penn in October 2015 threatened employees with loss of benefits and unspecified reprisals by telling employees that they would start from scratch and lose everything if they selected the Union as their bargaining representative.[15]

With respect to the allegations in paragraphs 7(c) and 9(c), Froio credibly testified that approximately a week after the union rally was held, he began to attend meetings conducted by Penn. Froio recalled attending three or four such meetings that would normally be attended by approximately 10 drivers. According to Froio, at the first meeting, Penn introduced himself and said that the Respondent wanted employees to speak with him regarding the union campaign. Penn told the employees that he left the Teamsters because he no longer liked his job. After having his recollection refreshed by his pretrial affidavit, Froio testified that at the meeting held on October 7, 2015, Penn told the employees that management "wanted to fix things" for them. Penn's testimony does not contain a denial of the statement that Froio attributed to him on October 7.

I find that Froio's testimony regarding Penn's statement that management wanted to fix things for the employees does not violate the Act. There is no evidence that Penn directly or impliedly questioned employees regarding grievances or problems that they had. Penn's vague statement that management wanted to "fix things" is insufficient to constitute an unlawful promise to remedy problems or grant benefits. Thus, I find that Penn's statement does not violate Section 8(a)(1) and I shall dismiss paragraphs 7(c) and 9(c) of the complaint.

The General Counsel presented several witnesses in support of paragraph 13 of the complaint. Froio testified that at the meeting that he attended with Penn on October 7, and stated that if the Union "got in" there would be bargaining between the Respondent and the Union. Froio further testified that he recalled Penn stating "a lot of time you might not get the same stuff

[15] Paragraph 15 of the complaint alleges that Penn violated Section 8(a)(1) regarding certain statements that he made with regard to the drivers and helpers annual wage increase. These allegations will be addressed in my consideration of paragraph 21(a) of the complaint which alleges that the Respondent violated Section 8(a)(3) and (1) in December 2015, by withholding the drivers and helpers expected annual wage increase.

that you have now." Finally, Penn stated that "everything has to be negotiated and you're leaving your negotiations to a second party."

At the time of the hearing Miguel Caminero was employed by the Respondent as a supply driver and testified on behalf of the General Counsel pursuant to a subpoena. Caminero had worked for the Respondent for approximately 8 years; he started as a furniture driver but had worked as a supply driver since approximately 2012. Caminero testified that he attended approximately five or six meetings with Penn. At each meeting, 10 to 12 drivers and helpers were present. At one of the meetings that Caminero attended, Penn told employees that some of the Respondent's drivers in Connecticut had tried to have a union but that they had never got to negotiations and the employees withdrew from the union. According to Caminero, Penn also stated that the Respondent had to negotiate in good faith and that negotiations would start at zero. Caminero admitted that with respect to the meetings held by Penn, he had difficulty recalling one meeting from the next.

Brandao testified that he attended four or five meetings with Penn. Brandao recalled Penn saying at the first meeting that "everything was negotiable." Brandao further testified that at another meeting,[16] Penn said that the Respondent did not have to sign a contract and that "everything is giving and taking." Penn further stated that, "our benefits can go less, our pay can go less, or can stay even, we can lose our benefits."

During this meeting Brandao sent text messages to Smolinsky (GC Exh. 24, p. 17). These text messages corroborate some of the substance of Brandao's testimony. In this connection, Brandao sent text messages indicating, "He saying that if we win and go for contract that Mason does not have to sign a contract." and "He saying that company can bargain for less wat (sic) we make now we can lost wat (sic) we have now."

Penn testified that he had worked as a labor consultant for over 25 years and had worked for a multitude of employers on over 350 union organizing campaigns. Prior to his career as a labor consultant, Penn had worked for the Teamsters Union in various capacities for approximately 10 years. With respect to the meetings he conducted with employees at the Respondent's Boston facility, Penn testified that he told employees that the company must negotiate if the Union won an election and that both sides had an obligation to bargain in good faith. Penn specifically denied making any statements at the October 13 meeting that Brandao attended, or any of the other meetings that he conducted, that bargaining starts from scratch, starts from zero, or starts with a blank page. Penn explained that there was a give and take in bargaining. Penn testified that he always tells employees that they could end up with more, the same, or less than they had when the union filed a petition. Penn specifically testified that he did not say at the meetings he conducted with the Respondent's employees that employees could get either the same or less without mentioning that they could also get more.

[16] Other evidence establishes that this meeting occurred on October 13 at 6 a.m. (Jt. Exh. 4; GC Exh. 24a, p.17.)

Penn's testimony is corroborated by a printout of a power point presentation that he utilized at the meeting he held devoted to collective bargaining on October 13, 2015 (R. Exh. 7). Penn testified that he uses a power point presentation as an aid to his oral presentation. In this connection, the power point presentation contains a slide indicating:

> "What is "Good Faith" Bargaining? The parties must meet at reasonable times, places, and intervals; and they must listen to one another's proposals and respond; and the parties must meet with an "open mind" and try to reach an agreement. That is all that federal law requires! (R. Exh. 7, p. 5.)

The power point presentation contains two other slides indicating:

> "Is it bad faith (illegal) to offer the same or less than you currently have?" "There is of course, no obligation on the part of an employer to contract to continue all existing benefits, nor is it an unfair labor practice to offer reduced benefits. Midwest Instruments, 133 NLRB No. 115." (R. Exh. 7, p.7.)

Finally, another power point presentation slide indicates:

> "No one can predict the outcome of collective bargaining. WB Mason will negotiate in good faith, but it does not intend to agree to Union proposals that are not in the best interest of the business, hurt the company's competitive position, or impact its ability to serve its customers. It is possible the Union may negotiate more, the same, or less than what you have now-plus the Union will want you to pay union dues. There are no guarantees in collective-bargaining. (R. Exh. 7, p. 9.)

I find that Penn's testimony regarding what he told employees regarding the collective-bargaining process at the October 13 meeting and other meetings that he conducted with the Respondent's employees is the more reliable version of what he stated at these meetings. Penn's testimony on this issue was clear and concise and his demeanor reflected certainty with regard to the substance of his testimony. His testimony was corroborated in major respects by the power point presentation that he displayed to employees at the meeting held on October 13. Accordingly, I credit Penn's testimony to the extent that it conflicts with the testimony of the employee witnesses. The demeanor of the employee witnesses were testifying to these events reflected some uncertainty as to exactly what Penn said. Caminero candidly admitted that he had trouble recalling one meeting from the next. On the whole, the testimony of the employee witnesses is not sufficiently detailed and consistent to serve as a basis for factual findings.

Based on Penn's credited testimony I find that he told employees that if the Union won an election both sides would have an obligation to bargain in good faith. He further explained to employees that bargaining was a process of give and take and that they could end up with more, the same or less than they had when the union filed the petition. I find that he did not say that negotiations would start at zero.

Penn's statements did not indicate that the Respondent would unilaterally discontinue existing benefits if the employees selected the Union as their representative. Rather, Penn stated that the parties had an obligation to bargain in good faith, and that through the bargaining process employees could end up with more, the same, or less than their existing benefits. The Board has long held that statements reflecting the possible loss of existing benefits through good-faith bargaining does not constitute an unlawful threat of the loss of existing benefits. *Wild Oats Markets, Inc*., 344 NLRB 717, 717-718 (2005); *Bi-Lo*, 303 NLRB 749, 749-750 (1991); *Histacount Corp.,* 278 NLRB 681, 689-690 (1986). Accordingly, I shall dismiss paragraph 13 of the complaint.

The Alleged Grant of Benefits in Violation of Section 8(a)(3) and (1)

Paragraph 16 of the complaint alleges that since about September 29, 2015, the Respondent violated Section 8(a)(3) and (1) by granting benefits to employees in the following manner: (a) improving the efficiency of its warehouse, delivery routes and truck loading; (b) assisting employees in the performance of their duties; (c) providing refreshments to employees on a frequent basis; and (d) granting child dependent care benefits to employee Miguel Caminero.

With respect to paragraphs 16(a) and (b), the credited testimony of employees Froio, Castro, Caminero, Kenny DeAndrade, Brandao, and Brennan establishes that the Respondent took extraordinary measures to assist drivers and helpers at the Boston facility after the Union requested recognition on September 28. In this connection, Froio testified that Jeff DePaul, who he understood to be a manager at the Woburn facility, came to the Boston facility shortly after the petition was filed and was present on a daily basis for a period of time. Foio observed that DPaul focused on improving the efficiency by getting the trucks loaded properly. Castro testified that in the first week of October, DePaul told him he was there to try to fix the problems that existed in the warehouse and get the trucks properly loaded for same-day deliveries.[17] Caminero testified that after the union rally, the paperwork associated with deliveries was prepared in a more timely manner and trucks were correctly loaded.

Kenny DeAndrade testified that at the time of the union rally, the route that he drove covered both Needham and Newton, Massachusetts. Prior to the union rally, Kenny DeAndrade had spoken to his supervisor, Ryan Clifford, and, Eric, another goldstar supervisor at the Boston facility whose last name he did not know, and asked for help on his route. DeAndrade was told that "they" would look into it but no changes were made in his route prior to the rally. Approximately 2 weeks after the rally, the Newton area deliveries were taken from his route, giving him less stops to make.[18]

Kenny DeAndrade also testified that after the rally, the drivers were assigned substantially more help with deliveries. DeAndrade observed individuals from other Respondent

[17] Carlos DeAndrade admitted that DePaul was present at the Boston facility in order to streamline matters in order to reduce employees' hours (Tr. 916).

[18] Carlos DeAndrade testified that Kenny DeAndrade's route was changed in June 2015. The Respondent produced no records to support Carlos DeAndrade's testimony. I credit Kenny DeAndrades testimony on this point as he testified consistently on both direct and cross-examination and his demeanor reflected certainty with respect to this issue.

facilities loading trucks and helping with deliveries, and had never before observed such individuals at the Boston facility. Brandao also testified that after the union rally he observed individuals from other facilities loading trucks and assisting in deliveries for a couple weeks. Individuals from the Respondent's facilities in Woburn, Albany, and Syracuse assisted Brandao in making deliveries. The individual from Albany told Brandao that he was a goldstar supervisor. When Brandao asked him why he was there, the individual replied "Because of the situation that is going on here." Brennan also testified that during the first week of October, John Velez, a supervisor who had worked at various Respondent facilities around the country, assisted him with deliveries.

After the union rally was held, Froio and Caminero observed Meehan, Meath, Carlos DeAndrade, and Sullivan on the loading dock much more than before. According to Froio, prior to the rally, Meath would be on the dock once every of couple weeks. In the 2 weeks after the rally, he observed Meehan on the dock approximately 3 or 4 times. After the rally, Froio observed managers loading trucks and, on one occasion, Meath assisted in loading his truck, which had never occurred before.

Meath admitted that after the petition was filed and the union rally was held, the Respondent assigned individuals it referred to as "linebackers" to assist with delivery operations at the Boston facility (Tr. 617). Meath described linebackers as individuals who possess a number of skills in distribution and assist the Respondent in managing the growth of its business. According to Meath, linebackers typically drive routes, train drivers, process returns, fill orders and help with the loading of trucks. Meath identify the following individuals as linebackers who were assigned to assist in the delivery operations of the Boston facility in early October 2015: Bob Federici, who is based at the Albany facility; Josh Garvey, who is based at the Syracuse facility; John Velez, who works nationwide; Victor Jordan, who is based at the Woburn facility; Juan Pichardo, who is a goldstar supervisor at an unnamed facility and Mr. Hames, whose primary location was not identified. Meath testified that there were as many as six linebackers working in Boston at the same time between September 28 and October 15. Meath recalled that in the past the Respondent had utilized 5 or 6 linebacker at one time in the South Brunswick, New Jersey, and Columbia, Maryland facilities. The precise circumstances regarding the use of linebacker is at those facilities was not explained. Meath merely indicated that at the South Brunswick, New Jersey facility, linebackers were utilized to fulfill orders, and assist with delivery issues that arose out of the growth of the business.

Carlos Andrade testified that using Boston facility supervisors, sales representatives, and sales managers to assist in loading trucks in making deliveries was no different from what the Respondent's practice at the Boston facility had been in the past.

Based on undisputed evidence and the credited testimony of the employee witnesses, I find that after the Respondent became aware of the Union's organizing campaign, it took action to approve the efficiency of the warehouse and delivery operations and assisted employees in the performance of their duties. I find this to be particularly so through its extensive use of up to six linebackers during the period from September 28 through October 15. The use of linebackers was unprecedented in the history of the Boston facility and there is no evidence to establish that the decision to utilize linebackers at the Boston facility was made prior to September 28, 2015. The Respondent readily admitted that linebackers were not utilized until after the filing of the

petition. While the record establishes that the Respondent had utilized linebacker is at other facilities prior to the filing of the petition at the Boston facility, the record is sparse regarding the circumstances under which they were utilized. Certainly, the Respondent has not proven that there was such a clear and consistent policy regarding when it utilized linebackers to establish that their use at the Boston facility was governed by factors other than the then pending election

I also find that the Respondent increased its use of managers, supervisors, and sales representatives to assist in loading trucks and helping with deliveries after the Respondent learned of the organizing campaign, although there is some evidence that such individuals had assisted in the delivery process prior to the campaign. In addition, the Respondent eliminated several stops from Kenny DeAndrade's route, thus making it easier.

As discussed above, in *Donaldson Bros. Ready Mix Inc*., supra, the Board summarized the principles to be utilized in determining whether a grant of benefits violates Section 8(a)(3) and (1). Applying those principles to the instant case, I find that the Respondent has not met its burden of showing that it would have conferred the same benefits in the absence of the Union. In this connection, the Respondent attributes its use of linebackers the Boston facility to the increased volume of business that emanated from its acquisition of NEOS. However, the acquisition of NEOS occurred in August 2015, substantially prior to the Union filing its petition. Similarly, the assignment of DePaul to the Boston facility and his successful efforts to increase the efficiency regarding the loading of delivery trucks, only occurred after the filing of the petition. Although the Respondent had utilized supervisors and other individuals in the Boston facility, prior to the filing of the petition, to assist in the loading of trucks and assisting in deliveries, the increased use of such individuals occurred only after the filing of the petition. Finally, while Kenny DeAndrade requested help with his long and busy route prior to the filing of the petition to no avail, after the petition was filed an entire area on his route was removed. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act as alleged in paragraphs 16(a) and (b).

With respect to the allegation in paragraph 16(c) of the complaint, Froio testified that prior to the filing of a petition, the Respondent provided food and beverage at drivers' meetings that were held once a month. After the petition was filed, Froio recalled bagels being present in the area of the loading dock approximately once a week. In addition, the Respondent provided bagels at the morning meetings that were conducted by Penn. Caminero testified that prior to the rally, he would observe Sullivan on the loading dock approximately once every 2 to 3 weeks. After the rally, Caminero testified that he saw Sullivan on the loading dock every day, speaking to drivers and helpers and offering them cookies and ice cream. Chery, who was employed by the Respondent from July 7, 2015, until October 2, 2015, testified that the Respondent did not provide food and beverage to employees prior to the filing of the petition. Chery testified that after the union rally held on the morning of September 29, Respondent conducted a meeting with drivers and helpers and provided donuts and coffee. Chery further testified that after the rally, the Respondent again provided breakfast in the break room prior to his layoff on October 2, 2015.

On September 30, 2015, then union supporter Edwards sent the following text message to others union supporters (GC Exh. 24c p.14):

> So fake, this mornn (sic) the cheeseburgers and soggy sausages for frikken bagels. Oh yeah gee Thnx guys. Overnite they flip like a switch !!! See through it guys its all games on their end.

Edwards text message appears to support two points: the Respondent had a practice of providing, on occasion, food to employees; and that, at least in Edwards' view, the quality of the food was better on September 30 than it had previously been.

Sullivan testified that, prior to the filing of the petition, the Respondent held meetings with drivers and helpers at least once a month, and that food and beverage was provided these meetings. If there was any food left over from these meetings, it was placed in the break room for employees. Sullivan also testified that there is a refrigerator in the dock area and that cans of soda had historically been placed in a refrigerator for employees. Sullivan explained that if a 12 pack of soda was dropped and one can was damaged, the other 11 cans would be placed in the refrigerator as the product would not be delivered to a customer in a damaged package. Sullivan testified that, since the filing of the petition, the Respondent had made no changes in the provision of refreshments to employees. Sullivan did not specifically deny offering employees cookies and ice cream in the loading dock area after the petition was filed.

I credit the testimony of the employee witnesses over that of Sullivan to the extent it conflicts. All of the employee witnesses testified in some detail and their demeanor reflected a desire to testify truthfully. I note, in particular, that Froio and Caminero are current employees and it is unlikely that their testimony adverse to the Respondent's interest would be false. Sullivan testified in a more generalized fashion and, as noted above, she did not specifically deny that she consistently offered employees cookies and ice cream after the filing of the petition.

I find that the Respondent, prior to the filing of the petition, provided food and beverages to employees at monthly driver meetings. After the petition was filed, the Respondent provided bagels to employees in the loading dock area on at least a weekly basis. I also find that after the filing of the petition, Sullivan was present in loading dock area on a daily basis and offered employees cookies and ice cream.

The Board has consistently held that it is a legitimate campaign device and not coercive for employers to provide free food and drinks of minimal value to employees. *Far West Fibers, Inc*., 331 NLRB 950, 952 (2000) and cases cited therein; *Joe's Plastics*, 287 NLRB 210 (1987). In the instant case, while the Respondent had a practice of providing food and beverages to employees at least at monthly driver's meetings, after the filing of the petition it increased the frequency of providing similar food and beverages to employees on at least a weekly basis. In addition, the Respondent offered ice cream and cookies to employees on a daily basis after the filing of the petition. Obviously, the food and beverage offered to employees was of minimal value. I find no discernible difference between the instant case and the cases cited above in which the Board found such conduct did not constitute interference with employees' statutory rights.

I find the instant case to be distinguishable from *River Parish Maintenance, Inc*., 325 NLRB 815 (1998), which the General Counsel relies on to support this complaint allegation. In that case, the Board found that an employer's holding of an off-site "crab boil" for employees 2

days before the election constituted objectionable conduct. The employer had required unit employees to attend its off-site campaign meeting and paid the employees an extra hour of pay to attend the crab boil. The Board emphasized that the employer engaged in objectionable conduct because the employees could reasonably have viewed the receipt of an extra hours pay as intended to influence their votes in favor of the employer. In the instant case, the only benefit provided was food and beverage of minimal value. On the basis of the foregoing, I shall dismiss paragraph 16(c) of the complaint.

With respect to paragraph 16(d) of the complaint, Caminero testified that at some point that is not in the record, he signed up for a dependent care plan under which $85 a week was deducted from his paycheck and set aside for dependent child care expenses. According to Caminero, his wife had taken a 6 month leave of absence from her job in order to care for her mother. During this period, Caminero's wife would also be able to care for their child and thus he did not need to pay for child care expenses during that time. Caminero testified that he spoke to Hallinan about canceling the dependent care deduction from his paycheck. At the trial, Caminero had substantial difficulty recalling the date that he spoke to Hallinan. In his pretrial affidavit, however, which is dated November 16, 2015, he indicated that he finally spoke to Hallinan around August 2015 (Tr. 251-252). I find this to be the most reliable evidence regarding the date of conversation with Hallinan. Caminero testified that Hallinan told him that the deduction could not be canceled. Caminero further testified that he spoke to Sullivan about the matter shortly after the union rally was conducted and Sullivan was able to cancel the $85 weekly deduction.

Hallinan did not testify regarding this issue. Sullivan testified that as part of her regular duties she assists employees with their benefits and makes sure that the proper paperwork is submitted to the benefits administrator. Sullivan is familiar with flex spending accounts which allow employees to put pretax dollars into a fund in order to pay for dependent child care expenses. According to Sullivan, the open enrollment period for establishing such a flex spending account is in May of each year. Sullivan explained that the open enrollment period is the only time that an employee can make changes to dependent child care coverage unless there is a qualifying event, such as marriage or divorce, birth for child, loss of a job, or loss of insurance coverage.

Sullivan testified that in mid to late September 2015, Caminero spoke to Sullivan and told her that his wife had left her job to take care of her mother and could therefore also take care of their child. Caminero told Sullivan he no longer needed dependent child care coverage and he was losing out on the money that he was putting into that account. When Sullivan learned that Caminero had earlier spoken to Hallinan about this matter, she spoke to Hallinan about it. Hallinan told her that he had not gotten far with Caminero's request. Sullivan then called the benefits manager and explained Caminero's situation. The benefits manager told Sullivan that it sounded like a qualifying event and she would speak to Burkowsky to see if Caminero's request could be approved. Ultimately, Caminero's request was approved and the weekly deduction was canceled.

Sullivan testified that on two other occasions she had dealt with a request to change coverage outside of the open enrollment period. In the first instance, a sales representative, Tom Butler, had forgotten to enroll and Sullivan was able to assist him in enrolling in a flex spending

account as a late enrollment. Sullivan herself also requested an increase in her flex spending account for medical coverage outside the enrollment period that was granted. Sullivan testified that she did not handle Caminero's request any differently than Butler's request or her own.

There is little dispute between the testimony of Caminero and Sullivan regarding Caminero's request. While Caminero had great difficulty in recalling the date of his discussion, I credit his testimony that he spoke to Sullivan about it shortly after the union rally was held on September 29. I believe Caminero would recall the sequence of those two important events. Sullivan's testimony on this point does not directly conflict with that of Caminero as she testified she recalled his request being made in mid to late September 2015. I credit Sullivan's uncontradicted explanation as to the manner in which she handled Caminero's request regarding the cessation of his dependent child care expense deduction and the two previous situations involving enrollment in flex spending plans outside of the open enrollment period.

Consistent with my analysis of the other allegations in paragraph 16 discussed above, I will apply the analysis utilized by the Board in *Donaldson Bros. Ready Mix, Inc*., supra, in deciding whether the Respondent unlawfully granted a benefit to Caminero. Applying that analysis, I find that the Respondent has met its burden of establishing that it handled Caminero's request to cancel his dependent child care expense account in the same manner that it would have in the absence of the Union. After Caminero spoke to Sullivan, who was the individual who assisted employees in obtaining their desired benefits, she went through the normal process to effectuate a requested change outside of the open enrollment period. This action was consistent with the approach Sullivan had taken regarding two other requests to enroll or make a change in a flexible spending account outside the open enrollment period. While the record does not clearly indicate what, if anything, Hallinan did with Caminero's request, I am convinced that once Sullivan became aware of the matter, she assisted Caminero in the same way that she would have if the Union had not filed a petition. In this connection, there is no evidence that similar requests were denied with finality by the Respondent prior to the advent of the campaign. Thus, there is no evidence to establish that the Respondent deviated from its policy on handling requests for changes in flex spending accounts outside of the enrollment period. Accordingly, I shall dismiss paragraph 16 (d) of the complaint.

The Alleged Violations of Section 8(a)(3) and (1) Regarding the Layoffs of Chery, Cobbler, and Ribeiro and the Suspensions and Discharges of Becerra, Castro, and Brennan

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. Accord; *Mesker Door, Inc*., 357 NLRB 591 (2011). In the instant case, I will

apply the Board's *Wright Line* doctrine in deciding the Section 8(a)(3) and (1) allegations in the complaint regarding the layoff of Chery, Cobbler, and Ribeiro, and the suspension and discharge of Becerra, Castro, and Brennan.

An employee's union activity and the Respondent's knowledge of that activity varies from one employee to another and will be set forth in detail herein. It is clear, however, that the Respondent opposes the unionization of its drivers and helpers at the Boston facility. This animus to the union activities of its employees is primarily established by the violations of the Act that I find it committed herein.

The Layoffs of Chery, Cobbler and Ribeiro

Facts

Jason Cobbler was hired as a driver helper at the Respondent's Boston facility on May 4, 2015 (R. Exh. 12). Kerby Chery was hired for the same position on July 14, 2015 (R. Exh. 13.) as was Elton Ribeiro on August 26, 2015. (R. Exh. 14.) All three employees worked fulltime as helpers until they were laid off on October 2, 2015.

Cobbler testified that he was informed that he was hired by Hallinan, who told him that he would have a 2-month probationary period and after that he would be a permanent employee. Cobbler testified that Hallinan made no mention to him about being a seasonal employee.[19] Cobbler further testified that in approximately July 2015, he spoke to one of his supervisors, Benny, whose last name he could not recall.[20] Pitre approached Cobbler after he fell on the job and asked Cobbler if he was all right. Cobbler replied that he was okay. Pitre further asked Cobbler if he wanted to take the rest of the day off and go home. Pitre then told Cobbler to be careful "because you have got a long future here with us on the job, we like how you work."[21]

On August 26, 2015, Cobbler signed an authorization card (GC Exh. 72) that had been given to him by John Edwards.[22] After signing his authorization card, Cobbler attended at least two union meetings and appeared in both photographs that were given to the Respondent on September 28.

On October 2, Cobbler was called into Hallinan's office and was informed that work was getting slow and that he had been hired as a seasonal driver helper and they were letting him go.

[19] Hallinan did not testify regarding the hiring of Cobbler. I credit Cobbler's uncontradicted testimony

[20] I find, based on the record as a whole, that Benny Pitre was the supervisor that Cobbler spoke to. I found Cobbler to be a credible witness as his demeanor reflected a sincere effort to testify truthfully.

[21] Although Pitre testified at the trial he did not testify regarding his conversation with Cobbler. Accordingly, Cobbler's testimony on this point is uncontradicted and I credit it.

[22] Cobbler wrote his job title as ""Driver (Seasonal)" on his authorization card. Cobbler testified neither Hallinan nor any other supervisor had informed him that he was a seasonal employee prior to his layoff . Cobbler explained that he wrote that title on his authorization card because, after being hired, when he told other employees that he had been hired as a driver, he was told that he was "seasonal" because you had to work 2 months before you were a permanent employee. I credit Cobbler's uncontradicted testimony on this point.

When Cobbler asked Hallinan if he was being fired Hallinan replied "no." Cobbler was not given anything in writing regarding the reason for his layoff.

Chery testified that prior to being hired by the Respondent he was working at a radiator shop. Chery testified that he told Hallinan during his interview that, although he realized that a position as a helper was what was available, he would like to become a driver. Hallinan hired Chery at the conclusion of the interview and told him that he would have a probationary period and that, if he liked Chery's work ethic, he would hire him as a permanent employee. Hallinan did not tell him that he was hired as a seasonal employee.[23]

Chery signed an authorization card on September 3, 2015 (GC Exh. 17(a). Thereafter he attended two union meetings and appeared in both photographs of union supporters that the Union presented to the Respondent on September 28. Chery also participated in the union rally that was held at the Respondent's facility on September 29.

Chery testified that a couple of days before his October 2 layoff he worked with a goldstar supervisor named Benny, whose last name he did not know.[24] Pitre was driving that day and Chery was working as his helper. Pitre told Chery that he was a good worker and that a lot of others had said good things about him.[25] Pitre told Chery that he should look forward to getting his own route soon and that he would help him get that.[26]

According to Chery, approximately 2 weeks after being hired, he ordered a uniform through the Respondent. On the day he was laid off, Chery spoke to a manager, whose name he did not know, who asked him if he had any issues with the Respondent. Chery told this individual he would like to have a uniform that he ordered. When Chery told the manager his name, the individual said that he had seen Chery's name on a box of uniforms and he would give it to Chery that day or the next.

At the end of the day on October 2, Chery was called to Hallinan's office. Hallinan told him that it was unfortunate but he had to let Chery go. When Chery asked why, Hallinan merely replied that the Respondent "was going through a hard time right now." Chery testified that Hallinan did not say anything to him about being a seasonal employee at the time of his layoff.

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[23] Hallinan testified that he did not remember interviewing Chery. Thus, Chery's testimony on this point is uncontradicted. In addition, Chery testified that he would not have left his job at the radiator shop if he had been informed that the position with the Respondent was a seasonal job. Moreover, while Hallinan did not remember interviewing Chery, Hallinan acknowledged making a calendar notation reflecting that Chery would be starting on July 14, 2015. The notation states "He will be looking for Benny. Wants to become a driver after being a helper for a while." (GC Exh. 68.) I credit Chery's uncontradicted testimony regarding his interview as it is as it is corroborated by Hallinan's calendar notation.

[24] Based on the record as a whole I find that the individual was Benjamin Pitre.

[25] Chery's testimony on this point is corroborated by a text message Pitre sent to driver Carlos Pina on September 22, 2015. After notifying Pina that he could give him some help that day, Pitre sent Pina a message indicating "There a kid named Kirby he's good." (GC Exh. 76, p. 5.)

[26] Pitre generally denied that he ever promised a driver or helper that he would be promoted as Pitre had no authority in that regard. I credit Chery's testimony over that of Pitre. Chery's testimony had sufficient detail to establish that it is more reliable evidence than Pitre's general denial.

At the time he was laid off, Chery had observed flyers posted at the facility asking employees if they had any friends or relatives that were interested in working for the Respondent. Castro also testified that in late September and early October he observed flyers placed at the time clock and the area in which the drivers prepare paperwork for their routes, advising employees to contact the Respondent's human resources department if they had friends or relatives who were looking for work. Brandao testified that during the first 2 weeks of October, he observed signs posted at the facility indicating that if an employee successfully referred applicants for employment with the Respondent, the employee would receive a $500 bonus. As of October 1, 2015, the Respondent had a posting on Craig's list indicating that it needed supply drivers. (GC Exhs. 64 and 66; Tr. 349.)

Ribeiro did not testify at the hearing. The record establishes, however, that he signed an authorization card on September 3, 2015 (GC Exh. 17b). Ribeiro attended the union meeting held on September 13, as his name and signature appear on the sign in sheet at that meeting (GC Exh. 18). Ribeiro also appeared in the photograph of union supporters that was taken at that meeting (GC Exh. 19) and given to the Respondent on September 28.

Analysis

Applying the *Wright Line* analysis to the layoffs of Chery, Cobbler, and Ribeiro, it is clear that all three employees were supporters of the Union. In this regard, all three signed authorization cards and attended union meetings. Both Cobbler and Chery appeared in both of the photographs of union supporters that the Union gave to the Respondent on September 28. In addition, Chery participated in the union rally held at the Respondent's Boston facility on September 29. Ribeiro attended at least one union meeting on September 13 and he appeared in the photograph that was taken of union supporters on that date and given to the Respondent on September 28.

I find that the Respondent had knowledge of the union support of the three employees because of their appearance in the photographs of union supporters given to the Respondent on September 28, and the fact that Chery openly participated in the rally held at the Boston facility on September 29.

The Respondent has demonstrated its antiunion animus toward the Union and its supporters by virtue of the violations of Section 8(a)(3) and (1) that I find it committed in this case. In addition, I find that the timing of the layoffs, which occurred shortly after the Respondent learned that Chery, Cobbler, and Ribeiro were supporters of the Union, supports an inference that the layoff was motivated by their union activity. *DHL Express, Inc*., 360 NLRB No. 87, JD slip op. at 7, (2014); *State Plaza Hotel*, 347 NLRB 755, 755-756 (2006); *Toll Mfg. Co*., 341 NLRB 832, 333 (2004). Accordingly, I find that the General Counsel has presented a prima facie case that the layoffs of Chery, Cobbler, and Ribeiro were motivated by their union activity and the burden of persuasion shifts to the Respondent to demonstrate the same action would have taken place even in the absence of their protected conduct. *Wright Line*, supra at 1089.

The Respondent contends that Cobbler, Chery, and Ribeiro were hired as seasonal employees to assist the Boston facility in making deliveries for the school season and were laid

off at the conclusion of that season in October 2015. The Respondent notes that Chery, Cobbler, and Ribeiro were all listed as "seasonal, employees" on the Respondent's Employee Action Form (EAF), that the Respondent maintained for each employee. (R. Exhs. 12, 13, and 14.) The Respondent further contends that the layoff of five other employees seasonal who were employed at the Boston facility at the same time as Chery, Cobbler, and Ribeiro establishes that the Respondent had a lawful business reason for the layoff.

Carlos DeAndrade testified that he made the decision to lay off Chery, Cobbler, and Ribeiro in October 2015. DeAndrade testified that seasonal employees are hired to assist with deliveries during the school season which runs from June through the end of September. According to DeAndre, once that season ends there is no longer a necessity for a seasonal employee. Carlos DeAndrade noted that the EAFS for Cobbler and Ribeiro noted that they were seasonal employees and the EAF for Chery indicated he was seasonal/temporary. DeAndrade testified that the layoff of Chery, Cobbler, and Ribeiro was consistent with the Respondent's use of seasonal employees. (Tr. 808-810.)

With respect to the Respondent's contention regarding the hiring of seasonal employees during the school season, Hallinan and Meath also generally described the season as running from June through October. Carlos DeAndrade also testified, however, that January was the Respondent's busiest month (Tr. 952), and that the Respondent was "always looking for employees." (Tr. 815.) Hallinan also testified that there was always a lot of work to be done at the facility.

The Respondent's hiring record with respect to the 15 occurrences where it hired or rehired supply driver helpers during the period from April 2013 through October 2, 2015, reflects that, in addition to Chery and Ribeiro, only four other employees (McNair, Mullen, Sanchez, and Ross) were hired during the period from June 1 through October 1 (GC Exh. 32). Ross was hired on September 18, 2014, which would be near the end of the school season asserted by the Respondent. The other 9 occurrences where the Respondent either hired or rehired helpers occurred during the months of January, March, April, May, and December.

The record demonstrates that of the 15 occurrences where the Respondent hired or rehired helpers during the period from April 2013 through October 2, 2015, only Chery, Cobbler, and Ribeiro were laid off. Two helpers, Glynn and McNair left to return to school, with Glynn leaving to return to school on two occasions. One helper resigned, one helper was terminated, four helpers were promoted to a supply driver position, one was promoted to a furniture driver and two others were transferred to other positions. (GC Exh. 32.)

The evidence regarding the Respondent's hiring of helpers does not establish that they were hired and laid off on the basis of a well-defined season. In fact, the only helpers laid off during the period from April 2013 through October 2, 2015 were Chery, Cobbler, and Ribeiro. The record also establishes that a substantial number of helpers were promoted to positions as drivers or other positions in the Boston facility. The other helpers that were hired during that period either left voluntarily or were discharged for cause. The credited testimony of Chery and Cobbler establishes that they were both told that their work was good and there was a substantial likelihood that they would be made permanent employees after the expiration of their probationary period. Such evidence supports a finding that the Respondent intended to retain

Chery, Cobbler, and Ribeiro as permanent employees if they continued to perform well during their probationary period. This evidence is also consistent with the Respondent's record of transferring helpers to positions as drivers and other jobs in the facility. The lack of any consistent history of laying off helpers in early October not support the Respondent's position.

The fact that the distribution operation that Respondent's Boston facility was extremely busy during September and the first part of October 2015, also weighs against a finding that the layoffs of Chery, Cobbler, and Ribeiro were based on lawful business considerations . In this regard, Castro's uncontradicted testimony establishes that orders increased during this period and that approximately 20 to 25 additional of stops were added to his daily route. Brandao also testified that he was very busy in early October and had a helper assigned every day. As noted above, on October 1, the Respondent had a posting on Craig was seeking supply drivers. In addition, there were flyers posted throughout loading dock area encouraging employees to refer friends and relatives to the Respondent for employment and even offering a $500 bonus to employees for a success referral. As discussed in detail above, the Respondent was utilizing six to eight linebackers in the Boston facility in early October because of the heavy volume of business that the facility was experiencing. This evidence refutes Hallinan's statement to Cobbler at the time of his layoff that things were "slow" for the Respondent. While Hallinan's statement to Chery that the Respondent was going through a "hard time" may well be true, the hard time Hallinan referred to was clearly not a lack of business. It is more likely that the reference was made in relation to the Union's organizing campaign.

The record establishes that on October 2, 2015, the Respondent also laid off the following employees: Nathanelle Dorvil, a supply picker who was hired on August 24, 2015; Jesse Jordan, a school picker who was hired on August 26, 2015; Leonardo Medina, a supply picker who was hired on June 24, 2015; Aeisha Palmer, supply picker who was hired on July 20, 2015; and Sophia Wilson, a school picker who was hired on July 13, 2015. However, there is no further evidence regarding the circumstances surrounding the layoff those employees or what they were told at the time of their hire regarding the length and nature of their employment. From the job title of these employees, I infer that they were employed in the Respondent's warehouse at the Boston facility.

While the record does not contain any evidence as to the volume of work in the warehouse or the circumstances of the layoff of the five pickers, as set forth above, it does contain evidence regarding the substantial amount of work that existed for supply drivers and helpers in the distribution portion of the Respondent's Boston facility. The volume of work was such that the Respondent brought in linebackers to assist in delivery functions and also assigned supervisors and managers to assist in making deliveries.

While the Respondent's EAF forms referred to Chery, Cobbler, Ribeiro as seasonal employees, merely referring to employees as such, does not make one a true seasonal employee. The record in this case establishes that the Respondent's history from April 2013 through October 2, 2015, was that helpers moved on to other positions with the Respondent, primarily as drivers unless they left voluntarily or were discharged for cause. Since April 2013 the Respondent certainly had no practice of laying off supply drivers in October, in fact, as noted above, Chery, Cobbler, and Ribeiro were the only helpers that were laid off at all.

Under the circumstances, I conclude that under *Wright Line* the Respondent has not established by a preponderance of the evidence a legitimate business reason for the layoffs of Chery, Cobbler, and Ribeiro. I thus conclude that the Respondent has not rebutted the General Counsel's prima facie case by establishing it would have laid off Chery, Cobbler, and Ribeiro in the absence of their union activity. I therefore conclude that the layoff of Chery, Cobbler, and Ribeiro violated Section 8(a)(3) and (1) of the Act.

The Discharge of Oscar Castro

Facts

Oscar Castro worked as a supply driver for the Respondent from September 21, 2012, until he was suspended on October 1, and discharged on October 6, 2015. As noted above, Castro was the first employee to contact the Union in March 2015, after hearing numerous complaints from his coworkers about the work load increasing. Castro was an avid supporter of the Union, obtaining the signatures of three other employees on authorization cards, and attending union meetings. Castro appeared in both photographs taken of union supporters at union meetings that was given to the Respondent on September 28. Castro also participated in the rally held outside of the Respondent's Boston facility on September 29.

On the evening of September 18, 2015, the Respondent invited its hourly employees to attend a football game at the Boston College campus between Boston College and Florida State. Univeristy. The Respondent hired a bus to provide transportation for employees between its Boston facility and the football game. After the game, at approximately midnight, Castro boarded the bus for the return trip to the Respondent's facility. In addition to Castro, employees Brian Cooper, John Edwards, Sidney Inglese, Mario Castanheira, and Nick McCormick were present on the bus. No supervisors were present on the bus for the trip back to the facility. During the return bus ride an altercation occurred between Castro and Cooper. Castro, Cooper, Castanheira, and Edwards and been drinking alcohol earlier in the evening

Carlos DeAndrade testified that 2 to 3 weeks after the incident Hallinan informed him that Inglese had reported to him that Castro had choked Cooper on the ride back after the football game.[27] DeAndrade told Hallinan that this was something that they should take a serious look at pursuant to the provisions of the employee handbook. Thereafter, Hallinan conducted an investigation of the matter with Burkowsky, interviewing Castro, Cooper, and Castanheira. DeAndrade did not participate in any of the interviews that were conducted as part of the investigation.

On October 1, Castro met with Hallinan and Burkowsky in the human resources office. Hallinan told him they wanted to speak to him about the incident that occurred after the football game. Castro testified that he told Hallinan and Burkowsky that on way back from the football game he and Cooper started "fooling around" and "calling each other names and going back and forth." Castro testified they were calling each other "gay" and "pussys" According to Castro, it then became more serious and they started swearing at each other. Cooper was seated toward the

[27] Although Hallinan testified at the trial, he was not asked about informing DeAndrade of the altercation between Castro and Cooper. Inglese did not testify at the trial.

front of the bus while Castro was near the back. Castro recalled that Cooper stood up and started walking toward him and that Castro then also got up and pushed Cooper back and held him down on the seat. According to Castro, when he determined that Cooper was not going to hit him, he let him go and started walking back to his seat. Cooper then said something again as Castro was returning to his seat and he turned around. Castanheira then grabbed him and pulled him back. [28] Castro told Hallinan and Burkowsky that the situation just "escalated" and that "it was a dumb thing to do."

Pursuant to the request of Hallinan and Burkowsky, Castro provided the following signed statement on October 1 (GC Exh. 70):

> We were on the bus and we started joking around verbally. Things escalated from there. We went back and forth to me it was joking around. Then things went to (sic) far, in which we both stood up and started yelling at each other. In my perspective I thought he moved to hit me so I held him down to try and de-escalate the situation. After that when I saw that he wasn't going to hit me and I wasn't to hit him I let him up and started to sit back down. At that point we were still saying stuff to each other so someone else thought I was going back and grabbed onto me to hold me back. By that point I was mad and just wanted to sit down. We got back to her cars and we all went on our way.

According to Castro's uncontradicted testimony, at the end of the meeting he asked when the Respondent had found out about this incident and why it was being brought up then. Castro was informed that the Respondent had just found out about it that week. At the conclusion of the meeting, Castro was informed that he was suspended until the investigation was completed.

At the time of the hearing, Cooper had worked as an order picker for the Respondent for approximately 5 years and appeared as a subpoenaed witness on its behalf. Cooper testified that he did not know Castro prior to the altercation on the bus on September 18. On October 1, his supervisor, Capello, instructed him to meet with Hallinan. Cooper met with Hallinan in his office and no one else was present. Hallinan asked Cooper to tell him what happened regarding the incident on the bus. Hallinan did not indicate to him how it was that the Respondent became aware of this incident.

Cooper then relayed to Hallinan his version of what occurred that evening and, pursuant to Hallinan's request, provided the following signed statement dated October 1, 2015 (R. Exh. 11):

> On the way back from the game I was in the middle of a conversation with Sid who was seated in front of me. I was interrupted by Oscar in the back of the bus and called gay multiple times by him. I took this as a joke at first until it continued. I asked Oscar if he was just joking around with me or being serious. When Oscar said it was not a joke and meant it I then called Oscar an asshole. He

[28] At the trial, Castro testified that he reacted to Cooper's movement toward him because he has PTSD from military service. Castro testified that he had informed Supervisors Ryan Clifford and Jude Felix when he left to go to his PTSD therapy sessions once every 2 weeks.

> then instigated me to say he's an asshole to Oscar's face and told me that I would not do it. I walked to the back of the bus where Oscar was seated and said he was an asshole. I walked back to my seat to continue a conversation with Sid when I was approached by Oscar. Oscar grabbed me by my front throat in an aggressive way until 1 or 2 drivers from the back pulled him away. On the way off the bus Oscar gave a little nudge as he walked by me when we arrived back.

Cooper's testimony regarding what occurred on September 18 and what he relayed to Hallinan is consistent with the statement that he made on October 1. At the trial, Cooper clarified that Castro grabbed him by the throat with one hand and that it was approximately 30 seconds before other employees took Castro off of him. Cooper testified that he did not report the incident to anyone in management because it did not bother him enough "to make it a process."

At the time of the hearing Mario Castanheira was a current employee of the Respondent and testified on his behalf pursuant to a subpoena. Castanheira worked for the Respondent as a loader and had been employed there for approximately 11 years. On October 1, Castanheira was instructed by his supervisor to meet with Hallinan. Castanheira then met with Hallinan and relayed to him what occurred between Castro and Cooper on the bus on September 18. Pursuant to Hallinan's request, Castanheira provided a signed statement dated October 1 (R. Exh. 9) indicating the following:

> On Friday the night after the BC football game, coming back to the warehouse on the bus Oscar and Bryan were going back and forth with each other. Pretty sure Oscar started calling him gay and fag at first it was just joking around so I was laughing. Brian got up and called Oscar and I a pussy. I told him I wasn't involved and didn't say anything so questioned why he was involving me. Brian then sat down not having done anything and they continued to go back and forth. Can see things were escalating and they both continued. Oscar then got and went over to Brian and choked him. I had to get up and wrestle Oscar off of Brian and get in between the both of them. The ride continued for another 20 minutes or so and they both did not really say anything after that. Getting of the bus Oscar elbowed Brian and don't think they said much and walked to their cars.

Castanheira's testimony at the trial regarding what he observed and relayed to Hallinan is consistent with his statement. Castanheira testified that he did not report the incident to management because, while he thought the incident was serious, he did not want to have anybody get fired.

Carlos DeAndrade testified that after reviewing the statements provided by Castro, Cooper, and Castanheira, he concluded that Castro had engaged in physical abuse by choking Cooper. DeAndrade determined that Castro's conduct violated the provisions of the employee handbook contained in Section 3.9(A)(d) of the developmental discipline guidelines. (Jt. Exh. 2) This provision provides that "physical abuse or threats" constitutes gross misconduct for which an employee can be terminated. DeAndrade testified that he was unaware of any previous situations where employees had engaged in a physical confrontation. DeAndre testified that he consulted with Burkowsky and recommended that Castro be discharged and that Burkowsky

concurred. DeAndrade denied that Castro's union activities played any role in the decision to discharge him.

According to Castro's uncontradicted testimony, he received a call from Hallinan on October 5. Hallinan inform Castro that the investigation was concluded and that he no longer had a job with the Respondent. Castro asked what kind of evidence they had against him and if the other person had been disciplined as well. Hallinan replied that they could not give him any information and that whatever the Respondent does with the investigation "is up to them." Castro did not receive anything in writing from the Respondent regarding his discharge. Cooper was not disciplined for his role in the events of September 18.

Analysis

Applying the *Wright Line* analysis to the discharge of Castro, the General Counsel has established that Castro was an avid union supporter. Castro was the first employee to contact the Union regarding representing the employees at the Respondent's Boston facility in March 2015. Thereafter, he obtained the signatures of other employees on authorization cards and attended union meetings. Castro appeared in both photographs taken by the union of union supporters that was given to the Respondent. On September 28, Castro participated in the rally held outside of the Respondent's facility on September 29.

I find that the Respondent had knowledge of Castro's union support because of his appearance in the photograph of union supporters given to the Respondent on September 28 and his participation in the rally held outside of the Boston facility on September 29 in the vicinity of several of Respondent's supervisors.

The Respondent has demonstrated its antiunion animus toward the Union and its supporters by virtue of the violations of Section 8(a)(3) and (1) that I find it committed in this case. In addition, I find that the timing of Castro's discharge, which occurred shortly after the Respondent learned of his support for the Union, supports an inference that his discharge was motivated by his union activity, *DHL Express, Inc*., *State Plaza Hotel,* and *Toll Mfg. Co*, supra. Accordingly, I find that the General Counsel has presented a prima facie case that the discharge of Castro was motivated by his union activity and the burden of persuasion shifts to the Respondent to demonstrate the same action would have taken place even in the absence of his protected conduct.

The Respondent contends that its investigation into Castro's conduct on September 18 provided it with sufficient evidence to conclude that Castro physically assaulted Cooper. The Respondent contends that Castro's conduct constituted gross misconduct pursuant to its disciplinary rules and warranted his discharge. The Respondent further contends there is no credible evidence of disparate treatment with respect to its application of its disciplinary policy since there is no evidence that an employee had assaulted another employee prior to the incident between Castro and Cooper.

The Board has consistently held that in assessing a defense under *Wright Line*, an employer, in order to meet its burden that it would have taken the same action in the absence of the protected activity, does not need to prove that the employee actually committed the alleged

offense, but must show that it had a reasonable belief that the employee committed the offense and that it acted on that belief in taking the adverse action. *JJP Cassone Bakery, Inc*., 350 NLRB 86, 89 (2007); *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004); *McKesson Drug Co.,* 337 NLRB 935, 937 fn. 7 (2002).

In the instant case, Castro admitted, both in his recitation of the events to Hallinan and in his written statement, that after an exchange of name-calling he grabbed Cooper and held him. Cooper's recitation of the events to Hallinan and his written statement indicates that Castro initiated the incident by calling Cooper "gay" several times. When Castro told Cooper he was not just joking around, Cooper responded by calling Castro an asshole. When Castro dared him to say that to his face, Cooper walked to where Castro was seated and did so. Cooper then returned to his seat and Castro approached him and grabbed him by the throat until other drivers pulled him away. Neutral witness Castanheira's version of the events corroborates that of Cooper. According to Castanheira, after an exchange of name-calling that he believed Castro started, Castro left his seat and went over to Cooper and began to choke him and he had to wrestle Castro off of Cooper.

Under these circumstances, I find that the Respondent had a reasonable belief that Castro assaulted Cooper. Castro admitted that he grabbed Cooper. The more detailed and mutually corroborative statements provided by Cooper and Castanheira establish that Castro initiated the incident by beginning to call Cooper names and then later physically assaulted him.

I also find that he Respondent acted on this belief in discharging him. The Respondent's disciplinary guidelines clearly provide that "physical abuse" constitutes gross misconduct for which an employee can be terminated. Clearly, the assault of an employee by another employee at a Respondent sponsored event is a serious matter. I find the fact that Cooper was not disciplined by the Respondent for his involvement in the incident does not establish that Castro was treated disparately because of his union activity. The written statements provided by all three employees and their interviews with Hallinan establishes that the Respondent had a reasonable basis to include that Castro was the aggressor in the incident and that Cooper had not engaged in any conduct that warranted discipline.

There is no credible evidence in the record that the Respondent was aware of any prior physical confrontations between employees and thus there is no evidence of disparate treatment. While the General Counsel does not contend in his brief that an argument between Brennan and another employee, Justin Diflaminies, establishes disparate treatment, evidence regarding this matter was adduced by the General Counsel and warrants comment. Brennan testified that in August 2015, he got into an argument with Diflaminies. According to Brennan, after Diflaminies threw a 12 pack of soda at him, he approached Diflaminies and Diflaminies grabbed him by the neck and he then grabbed Diflaminies by the shirt before they were broken up and separated. Brennan claimed that Pitre was present and merely told him to calm down and that neither employee was disciplined. Brennan also testified that Castro was present during this altercation. However, Castro did not testify regarding this matter.

Diflaminies was a current employee at the time of hearing and testified for the Respondent pursuant to a subpoena. Diflaminies testified that in August 2015 he had an argument Brennan but denied that he threw a 12 pack of soda at him. Diflaminies testified that

while he and Brennan were standing close to each other there was no physical altercation. Diflaminies testified that Pitre intervened and that he and Brennan then walked away from each other. Pitre testified that he recalled observing a heated argument between Brennan and Diflaminies, who were standing close to each other. According to Pitre, he intervened and told both employees that this was nothing to lose their jobs over because if it became a physical altercation, he would have to report to management. According to Pitre, both employees then walked away from each other.

I credit the mutually corroborative testimony of Diflaminies and Pitre over that of Brennan regarding this incident. Their testimony was detailed and consistent. Importantly, Brennan's testimony was uncorroborated by Castro regarding an incident relevant to Castro's discharge. I find Brennan's testimony regarding the underlying argument between him and Diflaminies to be implausible. Thus, I have doubt regarding whether Brennan's recollection of this incident is sufficiently accurate upon which to base a factual finding.

While the Respondent did not establish precisely when the incident between Castro and Cooper was reported to it by Inglese, there is no evidence to establish that the Respondent received the report prior to its becoming aware of Castro's union activity. Because there is no credible evidence that the Respondent had previously failed to act when apprised of an employee assaulting another employee, I do not believe the available evidence permits me to draw an inference that the Respondent received the report and failed to act on it until Castro's union support became known. That is simply a bridge too far. The fact that the Respondent took statements from Castro, Cooper, and Castanheira on the same date, October 1, suggests that once it became aware of the incident, it considered it a serious matter and quickly investigated it.

I find that the fact that Cooper did not receive any discipline for his role in the incident on the bus does not establish that Castro was treated disparately because of his union activity. I find the evidence the Respondent obtained during its investigation led it to reasonably conclude that Castro initially initiated the incident and then physically assaulted Cooper and that Cooper's response to Castro taunting did not warrant discipline.

As noted above, I find that the timing of Castro's discharge, shortly after the Respondent became aware of his union activity supports the General Counsel's establishment of a prima facie case that his discharge was discriminatorily motivated. However, given the Respondent's clear rule giving it the right to discharge an employee who engaged in physical abuse and, in the absence of any disparate treatment evidence, I find that the Respondent has established that it would have taken the same action against Castro in the absence of his union activity. Accordingly, I find that the Respondent has established a valid *Wright Line* defense to the allegation that it discriminatorily suspended and then discharged Castro in violation of Section 8(a)(3) and (1) of the Act. Accordingly, I shall dismiss this allegation in the complaint.

The Discharge of Marco Becerra

Facts

Marco Becerra was employed as a supply driver for the Respondent from April 6, 2015, until his suspension on October 5, 2015, and his termination on October 6, 2015. His supervisor

was Ryan Clifford. Becerra had a busy route, when he was hired there were about 60 delivery stops and by the time he was discharged there was approximately 70. Because of the heavy volume on his route he typically worked with a helper, Jovariel Feliciano.

On August 28, 2015, Becerra signed an authorization card which had been given to him by Castro. Thereafter, Becerra attended the union meeting held at the Union's hall on September 13, but did not appear in the photograph that was taken at that meeting because he arrived after the photograph was taken. Becerra attended the union meeting held at the Westin hotel on September 16 and appeared in the photograph taken at that meeting. As noted previously, that photograph was given to the Respondent by the Union on September 28. On September 29, Becerra participated in the union rally that was held at the Respondent's Boston facility carrying a sign with the Teamsters Local 25 logo on it that indicated "Stop the war on workers."

On October 1, Becerra had a delivery of 15 cases of paper at the Boston Private Bank, which is located at 10 Post Office Square in Boston. Becerra testified that it was difficult to make deliveries at this building because the entry ramp had a 45° angle and did meet the sidewalk at a flush angle. In addition, Becerra had to make deliveries to other customers in that building. After making the delivery to Boston Private Bank, Becerra asked the customer's representative, Bob Ganno, if, in the future, he could split his order into either a morning or afternoon delivery, or split it into 2 days. Ganno replied that he could not. Becerra again asked Ganno if there was any he could work with Becerra and split his order in any way, and Ganno again replied no. Becerra then told Ganno that the next time he made the same order, Becerra would deliver 10 cases of paper and leave the rest on the truck. On cross-examination, Becerra testified that while he had a helper that day, at the time that Becerra was making the delivery to Boston Private Bank, the helper was inside another building making 10 other deliveries.

Later on October 1, Respondent received an email from Ganno (GC Exh. 53) which indicated:

> I just spoke to the WB Mason Del driver and he said if I order 15 Cases of Paper again he is only delivering 10 to 12 and returning the rest. This is cause (sic) our ramp is a problem for his delivery. I do not want to cut the order, because we use the paper each day and I do not want to wait for the delivery's (sic). What can be done?

On October 5, Carlos DeAndrade called Becerra to Hallinan's office. When Becerra arrived, Carlos DeAndrade, Hallinan, and Burkowsky were present. At the meeting, Carlos DeAndrade asked Becerra if he remembered making a delivery to Boston Private Bank and having interaction with the customer, and Becerra said that he did. DeAndrade then read the email that the Respondent had received from Boston Private Bank and Becerra acknowledged that the email was essentially accurate. Becerra explained to the Respondent's representatives the difficulty in making a large delivery to that customer and what he had told customer as set forth above. Becerra also acknowledged that he understood if the Respondent had a problem with the way he handled the matter. When Hallinan asked him to write statement regarding his discussion with the customer, Becerra declined. Becerra told the Respondent representatives that they had the customer's email and had taken notes on what he had told them that occurred. Hallinan then

told Becerra that they had no choice but to suspend him. Hallinan further indicated that the Respondent would conduct an investigation and let him know the outcome.[29]

On October 6, Becerra called Hallinan and asked if the Respondent had made any progress with the investigation. Hallinan replied that they had not. Later that day, however, Hallinan called Becerra and informed him that the Respondent had reached a decision and was letting him go because he had taken it upon himself "to change company delivery policy and he was not authorized to do that." Becerra did not receive anything in writing from the Respondent indicating the reasons for his discharge.

Carlos DeAndrade testified that he viewed Becerra's conduct as telling a customer how to conduct business with the Respondent was outside the scope of his authority and put the Respondent in a "tough situation." (Tr. 850.) Carlos DeAndrade also testified that during his tenure with the Respondent, he had not encountered a situation in which a driver had told the customer that unless the customer ordered less product, the driver would not make the complete delivery in the future. According to DeAndrade, he met with Burkowsky on October 6 and recommended that Becerra be terminated and that Burkowsky concurred. [30] DeAndrade testified that he and Burkowsky reach the conclusion that Becerra's conduct constituted insubordination and warranted termination pursuant to the rules set forth in the current employee handbook under developmental discipline guidelines, section 3.9. (Jt. Exh. 2.) The Respondent's employee handbook provides for a progressive discipline process that provides for the following steps: coaching-step 1; first warning-step 2; final warning-step 3; and termination-step 4. However, section 3.9(A)(d) of the developmental discipline guidelines provides "There are situations where the degree of employee misconduct constitutes grounds for immediate management intervention and possible termination of employment. In cases of Gross Misconduct, the Company reserves the right to bypass the Developmental Discipline process." Insubordination is included as an example of gross misconduct.

Analysis

Applying the *Wright Line* analysis to the discharge of Becerra, the General Counsel has established that Becerra was a strong supporter of the Union. Becerra signed his authorization card on August 28 and thereafter attended the union meeting held on September 16, where he appeared in a photograph taken by the Union along with other union supporters. Becerra participated in the union rally held outside of the Respondent's facility on September 29 carrying a sign with a Teamsters Local 25 logo on it.

It is clear that the Respondent had knowledge of the union support of Becerra because of his appearance in the photograph of union supporters given to the Respondent on September 28 and his participation in the rally held outside of the Boston facility on September 29 in the immediate vicinity of several supervisors.

[29] I credit the testimony of Becerra over that of DeAndrade regarding this meeting to the extent there is a conflict. Becerra testified in a candid and thorough manner and his testimony was consistent on both direct and cross-examination. His demeanor demonstrated a sincere desire to testify truthfully. Accordingly, I find his testimony regarding this meeting to be a more reliable version than that of De Andrade.

[30] Burkowsky did not testify at the trial.

The Respondent has demonstrated its antiunion animus toward the Union and its supporters by virtue of the violations of Section 8(a)(3) and (1) that I find it committed in this case. In addition, I find that the timing of Becerra's discharge, which occurred shortly after the Respondent learned of his support for the Union, supports an inference that his discharge was motivated by his union activity, *DHL Express, Inc*., *State Plaza Hotel,* and *Toll Mfg. Co*, supra. Accordingly, I find that the General Counsel has presented a prima facie case that the discharge of Becerra was motivated by his union activity and the burden of persuasion shifts to the Respondent to demonstrate the same action would have taken place even in the absence of his protected conduct.

In defending Becerra's discharge, their Respondent contends that his conduct in telling a customer that it needed to order less and threatening the customer with a partial delivery if it did not comply with his request, constituted a dischargeable offense. The Respondent further contends that the conduct Becerra engaged in was unprecedented at the Boston facility. While DeAndrade testified that Becerra's conduct constituted insubordination, neither his testimony nor the Respondent's brief explained why his conduct amounted to an insubordinate act.

It is undisputed that Becerra had received no discipline prior to his discharge and that the incident on October 1 was the first time that a customer had complained about him. The General Counsel contends that there is evidence in the record that establishes that the Respondent has treated other employees who have been the subject of customer complaints more leniently and thus Becerra was treated disparately because of his union activity

In this connection, on February 12, 2010, driver Rob Carter received a verbal correction notice for the manner in which he made a delivery (GC Exh. 39). The verbal correction notice indicates that after Carter made a delivery to a customer on February 11, 2010, the customer sent an email to the Respondent regarding the service that Carter had provided. The email indicated: "Whomever the driver who just tossed our box into office services without notifying themselves and returning to the elevator just lost you your business with us. You should thank him when you get a chance."

On June 27, 2012, Hallinan, who was then the Respondent's regional distribution manager, sent an email to supervisor Pitre regarding the conduct of driver Rob Coppola. In his email, Hallinan relayed a complaint from an individual at Children's Hospital regarding Coppola. The customer's representative complained that Coppola never came when she was there from 7:15 a.m. to 4:30 p.m., and did not obtain a signature for the order. The customer also complained that Coppola left boxes sitting in the hall, left boxes that were not for the radiology department, and that orders needed to be distributed throughout the department and not just left in a pile. On June 27, 2012, Hallinan sent an email to Debbie Inglesi, a customer service representative for the Respondent, indicating that he had instructed Coppola to speak to the customer about resolving the service issues and that the customer was satisfied that the situation was corrected. There is no evidence that Coppola received any discipline for this incident.

GC Exh. 45 reflects complaints made by a customer regarding driver Matt Cadoff.[31] On Friday, October 5, 2012, Bruno Rodriguez, an office services assistant for Walker & Dunlop, a customer of the Respondent, sent an email to Norm Piche, sales representative of the Respondent, requesting that a new driver be assigned to make their deliveries. On October 9, 2012, Rodriguez sent another email to the Respondent indicating: "Your driver clearly hates his job, which is fine . . . too (sic) each their own, but he should not have such negativity when dealing with the customers. He is constantly complaining about my orders being too big, and why I have to place such large orders for Friday deliveries. He acts as if I am burdening him with my orders and he has an "I do not care" attitude that even my boss has noticed recently which led to my email to Norm on Friday."

On October 11, 2012, Hallinan sent an email to Carlos DeAndrade indicating that he had spoken to Rodriguez and had asked him to allow Cadoff to remain as the driver for deliveries to Walker & Dunlop until after Rodriguez had met with DeAndrade. Hallinan's email summarized his notes from his conversation with Rodriguez as follows: "The bad attitude has been going on for a while. Bruno had become used to it and had turned a blind eye to it. His boss had heard Matt complaining last Friday and told Bruno not to deal with it any more. He complains 9 out of 10 times. Asks the customer to quit placing such large orders and not to order so much on Friday. Dumps stuff in the corners. Is never neat. Has never been into his job."

Hallinan's email to DeAndrade also indicated: "Mason lost the business to Staples for a while. Bruno was an advocate of getting the business back to Mason. When we got business back, Matt's comment was "That sucks." Bruno said he does not want anyone to loose (sic) their job over something like this, but he feels the only solution that will work for his boss is to have a new driver."

The Respondent produced no evidence to establish that Cadoff was disciplined for this conduct or even removed from making deliveries to the customer. Hallinan testified that Cadoff was later transferred to the Respondent's facility in Portland, Maine.

On January 17, 2013, a customer sent an email to a sales representative for the Respondent, Tommy Genatossio, complaining about the conduct of driver Eli Paul. The customer complained about a misdelivery and rude behavior. In her complaint, the customer noted, "I hate to say it, but it's all coming back to me why I stopped placing orders with WB Mason." Genatossio forwarded the email to Carlos DeAndrade. DeAndrade then sent an email to Hallinan and Supervisor Clifford stating: "Need to address this, I have spent a year getting this account back and Eli Paul did not get a good review." On January 19, 2013, Hallinan sent an email to Carlos DeAndrade reflecting that he had spoken to Paul who had denied being rude to the customer. Hallinan indicated that he informed Paul that regardless of whether he was intentionally offending the customer, "… he was making her uncomfortable and he needed to be sure to correct the situation. I specifically told him not to mention her sending us the information, but to treat her nicely. I asked him to let me know if there were any issues with this account going forward." (GC Exh. 44.) There is no evidence to indicate that any disciplinary action was taken against Paul.

[31] Although the series of emails in GC Exh. 45 refers to the driver by only his first name, Matt, Hallinan testified that Matt Cadoff was the driver involved. (Tr. 318.)

On February 23, 2016, the Respondent's Customer Client Relations Manager, Marie Baribeault, sent an email to Supervisor Rodriguez, Transportation Manager McIntyre, and Carlos DeAndrade, indicating that a customer had complained about the driver on route 324 (the drivers name does not appear in the email). The customer indicated that she did not want the driver to continue to make deliveries to her. According to the customer, the driver delivered the order in the wrong area. When the driver was told to deliver it to the kitchen store room as he had been shown in the past, he "slammed" the product back on his cart and "dumped" the delivery in the middle of the kitchen and was "grumbling" and "visibly upset." The customer later had to move the product to the proper place against the wall. (GC Exh. 46.) The Respondent produced no evidence indicating that the driver was disciplined or was even removed from making deliveries to the customer.

The Respondent contends that none of the other customer complaints are similar to the conduct of Becerra on October 1. Specifically, the Respondent argues that the situation involving Cadoff was entirely different from Becerra's. The Respondent contends that Becerra demanded that the customer order fewer products, while Cadoff did not. In addition, the Respondent contends that Becerra told the customer he would not deliver his order if the customer did not conform his order to Becerra's demands, while Cadoff did not.

Although Cadoff consistently asked his customer to quit placing such large orders and not to order as much on Friday, it is true that Cadoff did not tell the customer he would not deliver its full order in the future. It is also true, however, that Cadoff's customer noted that it had consistently encountered problems with the manner that Cadoff delivered its orders and requested that another driver make its deliveries. There is no evidence that Cadoff was disciplined for his conduct or even removed from making deliveries to the customer.

On the other hand, Becerra made the full delivery to Boston Private Bank on October 1, 2015, and requested its representative, Ganno, to split his order into a morning and afternoon delivery or split it over 2 days. When Ganno refused his request, Becerra said that he would deliver 10 to 12 cases of paper the next time and leave the rest of the truck. When Ganno reported Becerra's conduct to the Respondent, he only asked what could be done to resolve the issue and did not request that another driver be assigned to make deliveries to the bank.

While there is no evidence that the Respondent even spoke to Cadoff about his conduct, the Respondent summarily discharged Becerra's for his. The Respondent's handbook indicates that the first step in its discipline process is coaching. Rather than speaking to Becerra and correcting his approach to making deliveries at Boston Private Bank, the Respondent terminated him and informed him that the reason was because he took it upon himself to change company delivery policy and he was not authorized to do that. As noted above, at the trial DeAndrade testified that the Respondent considered Becerra's conduct to constitute insubordination. In my view, insubordination normally involves a refusal to follow a direct order given by an employer. As I have noted above, the Respondent gave no reason as to why it considered Becerra's conduct to be insubordinate. This leads me to the conclusion that the Respondent placed that label on Becerra's conduct in an attempt to have his discharge appear to conform to the disciplinary policy set forth in its handbook, which permits discharge for gross misconduct such as insubordination.

In assessing the Respondent's defense, I note that in order to meet the *Wright Line* burden the Respondent must establish that it has consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB No. 87, JD slip op. at 7 (2014); *Septix Waste, Inc*., 346 NLRB 494, 495-496 (2006). In this regard, an employer cannot simply present a legitimate reason for its action, but must prove by a preponderance of the evidence that it would have taken the same action in the absence of protected activity. *W.F. Bolin Co*., 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).

In reviewing the other evidence regarding what action, if any, the Respondent took regarding complaints made by customers regarding the service of other drivers, I note that the only other driver to receive discipline was Rob Carter, who was given a verbal correction notice for the manner in which he made a delivery. In this instance, the customer was so dissatisfied with Carter's service that it informed the Respondent that it would no longer do business with it. [32] With regard to the complaints made about Coppola and Paul, the Respondent spoke to them and instructed each employee to speak to the customer and attempt to resolve the service issues. As noted above, the record does not reveal that the Respondent took any direct action with Cadoff or the driver on route 342 regarding the complaints that had been made about them. I do not agree with the Respondent that the situation involving Becerra is not comparable to that involving the other employees against whom customer complaints were made. As set forth in detail above, the other situations involved serious issues that occurred regarding deliveries that had been made by drivers. Becerra's actions did not involve a problem with making the delivery on October 1, but rather his position with regard to future deliveries to the customer. Such a situation appears to lend itself to an easy resolution by discussing the matter with the Becerra, as it had done so with regard to the issues involving Coppola and Paul. This seems to be particularly so since the customer was only seeking for the Respondent to resolve the matter so that it could receive its full delivery in the future, and was not seeking to have Becerra removed as its supply driver or threatening to stop doing business with the Respondent. I note that there is no documentation regarding the Respondent's reason for discharging Becerra and that this is another difference between his discharge and the discipline given to Carter for service related issues. This establishes that his discharge did not occur according to the Respondent's normal processes. *DHL Express, Inc.*, supra, JD slip. op. at 9

As noted above, Becerra was discharged for the customer complaint made about him on October 1, without being given any opportunity to correct the service delivery problem that arose that day. The record reflects that the only other discipline given to a driver for customer service was a verbal correction notice given to Carter when his conduct resulted in the customer telling the Respondent that it was going to lose its business over the incident. Thus, in the only other instance when the Respondent imposed any discipline pursuant to a customer complaint, it was far short of termination, in a situation that caused much greater harm to the Respondent. Under these circumstances, the evidence establishes that Becerra was treated disparately and the Board has consistently found evidence of disparate treatment to be reflective of a discriminatory

[32] Although Carlos DeAndrade testified that the Respondent did not, in fact, lose the business of customer, he did not indicate when the Respondent became aware that the customer would continue to do business with it. The verbal correction notice given to Carter on February 12, 2010, notes that his conduct resulted in a loss of business. Thus, I find that the customer's decision to remain as a customer occurred after Carter's verbal correction notice was issued by the Respondent.

motive. *Lucky Cab Co*. 360 NLRB No. 43, slip op. at 4 (2014); *Windsor Convalescent Center*, 351 NLRB 975, 983 (2007), enfd in relevant part, 570 F.3d 354 (D.C. Cir. 2009).

On the basis of the foregoing, I find that the Respondent has not met its burden under *Wright Line* to establish that it would have discharged Becerra if he had not engaged in union activity. Accordingly I find that Becerra's suspension and discharge violates Section 8(a)(3) and (1) of the Act.

The Discharge of Sean Brennan

Facts

Sean Brennan worked as a supply driver for the Respondent from March 2014 until he was suspended on October 6 and discharged on October 9, 2015. During his period of employment, Brennan was assigned to route 307, which covered South Boston. His supervisor was Benjamin Pitre. Brennan's route was very busy and had about 70 to 85 stops in the morning and approximately 30 to 45 same day deliveries in the afternoon. Brennan would normally start work at approximately 5:30 a.m. and clock out between 4 and 5 p.m. Since his route was busy, he often had a helper.

Brennan signed an authorization card on July 25, 2015 and thereafter began attending union meetings. At the meeting held on September 13, he volunteered to be a leader in the organizing effort and appeared in both photographs that the Union took of union supporters and presented to the Respondent on September 28. Brennan participated at the union rally in front of the Respondent's Boston facility on September 29 in the presence of Respondent's supervisors, carrying a sign in support of the Union.

Brennan testified that in early October 1, one of the linebackers, supervisor John Velez was working with Brennan as his helper. While they were on the route, Brennan told Velez that the Respondent had offered him a transfer to Woburn and that he had declined it. Velez asked him why he did not take it. Brennan responded that if he did accept a transfer to Woburn, he could be fired a week later. Brennan also told Velez that he did not want to leave the other drivers hanging and wanted to be part of the group. Brennan testified that he thought that he brought up the subject of the Union and Velez asked him how involved he was. Brennan replied by telling the Velez that he had gone and "checked things out." Velez did not testify at the hearing so Brennan's testimony regarding this conversation is uncontradicted.

The General Counsel alleges in paragraph 12(b) of the complaint that in early October, 2016, Velez interrogated Brennan regarding his union activity. Based on Brennan's uncontradicted and credited testimony I find that Brennan first raised his involvement with the Union and that it was only then that Velez asked him how involved he was. Brennan replied that he had gone and "checked things out." Velez then asked no further questions regarding Brennan's involvement with the Union.

Applying the standards set forth in *Intertape Polymer Corp*., supra, I find that the conversation between the Velez and Brennan was not coercive. While there is substantial evidence of the Respondent's hostility to union activity among its employees, Brennan

voluntarily raised his involvement in the union to Velez, who was working that day as Brennan's helper. This conversation took place in the truck as they were making deliveries on Brennan's route. I find that Velez' brief question about the extent of Brennan's involvement in the union after Brennan voluntarily raised the fact that he was a union supporter did not restrain or coerce Brennan in the exercise of his Section 7 rights. Accordingly, I shall dismiss this allegation in the complaint.

On October 5 Brennan had 42 same day deliveries to make during the afternoon. While he was making those deliveries, Carlos DeAndrade called him and asked him if he wanted some help. Brennan replied that he did. DeAndrade then met Brennan on his route at approximately 2:45 p.m. and dropped off Sales Manager Joel Kershner to assist Brennan in making deliveries. While they were making deliveries, Brennan told Kershner that the number of same day deliveries can get to be out of control. According to the credited testimony of Kershner, he noticed that Brennan had missed the delivery at the John Nagle Fish Pier and mentioned to Brennan that he had missed the stop. Brennan acknowledged that they had missed the stop but kept on driving. When they returned to the warehouse at approximately 4 p.m., Kershner noticed that there were approximately 6 to 8 deliveries still on the truck. When Kershner asked Brennan why he did not make those deliveries, Brennan replied, "fuck same days on Morrissey Boulevard." (Tr. 679.)[33] After Brennan and Kershner returned to the warehouse, Brennan punched out at approximately 4 p.m.[34]

After Kershner returned to the warehouse, he reported to Carlos DeAndrade that Brennan left same-day deliveries on the truck.[35] DeAndrade testified that after receiving this information from Kershner, he went to the loading dock at approximately 4:15 p.m. to see what stops were left on Brennan's truck. Carlos DeAndrade recognized some of the customers were located within a mile of the facility and determined that some of the deliveries could be made because most customers stay open until 5 p.m. Carlos DeAndrade asked linebackers John Velez and Frank Hames to make as many stops as they could to minimize the impact on customers. According to DeAndrade, they were able to deliver six orders to three separate customers.

Brennan testified that on October 6, DeAndrade approached him at work and told him to meet him in Hallinan's office. When Brennan arrived, Carlos DeAndrade, Hallinan, and

[33] At the trial, Brennan admitted that he probably made such a statement (Tr. 389, 402).

[34] Brennan testified that he would finish his route before 5 p.m. approximately 4 days a week. Brennan further testified that most of the time when he returned to the warehouse he would still have some same-day deliveries on his truck. According to Brennan, after returning to the warehouse there was paperwork to do, including indicating how many stops were missed. After completing his paperwork, Brennan would punch out.

[35] There is no credible evidence that Kershner reported any further details of his interaction with Brennan at that time.

Burkowsky were present.[36] DeAndrade asked Brennan why he had missed four same day deliveries on Morrissey Boulevard the previous day. Brennan responded that he never made same-day deliveries on Morrissey Boulevard. Brennan further stated that Pitre had told him that it was okay to skip same day deliveries on Morrissey Boulevard. According to DeAndrade, Brennan was apologetic and said that he would never miss his same day deliveries again. Brennan was then asked to write a statement about the matter and he did so. Brennan's statement indicates: "I, Sean Brennan, will never miss my same-day stops before 5 pm!" According to Brennan, Burkowsky said there was going to be repercussions for this and that he was suspended pending an investigation.

Following the meeting with Brennan, DeAndrade spoke to Pitre about Brennan's claim that Pitre that permitted Brennan to skip same-day deliveries on Morrissey Boulevard. According to DeAndrade, Pitre told him that he had never given Brennan permission to do so.[37] After the meeting with Brennan, on a date that is not established in the record, DeAndrade testified that he also reviewed Brennan's scan report from his hand-held scanner which reflects information on the packing slip regarding what was delivered to a customer.[38] DeAndrade testified that Brennan's scan report reflected several scans at 4:08 p.m.[39] Since Brennan arrived facility somewhere between 4 p.m. and 4:10 p.m., DeAndrade testified that this meant that Brennan was likely to have scanned the paperwork at the facility. In DeAndrade's view, this created a problem because the driver is "falsifying a document that states that we have made a delivery." (Tr. 827.)

On cross-examination DeAndrade testified in a vague manner regarding reviewing Brennan's delivery reports, and did not indicate when this occurred, saying only that he did so "at some point." DeAndrade did not recall for what period of time that he reviewed Brennan's delivery reports but determined that Brennan rarely made same-day deliveries on Morrissey Boulevard and that therefore October 5 did not appear to be an abnormal day for him. (Tr. 933-934.)

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[36] Both Carlos DeAndrade and Brennan testified regarding this meeting. My findings regarding this meeting rest primarily on a composite of their testimony based upon what I find to be inherently plausible. I credit Brennan's testimony that he was asked about missing four same-day deliveries as his testimony is corroborated by a text message that he sent to Pitre later that day indicating he had missed 4 deliveries out of 42 (GC Exh 77., p. 15.) I do not credit DeAndrade's testimony that at this meeting he asked Brennan whether he had told Kershner, "Fuck same days on Morrissey Boulevard," as there is no evidence that Kershner had reported that statement to DeAndrade at that time. Rather, the credible evidence establishes that Kershner reported that comment for the first time in his written statement dated October 7.

[37] At the trial, Pitre testified that he had never given permission to Brennan to skip same-day deliveries on Morrissey Boulevard (Tr. 780-781).

[38] DeAndrade explained that the hand-held scanner also gave the customer an opportunity to sign for the delivery of the product. Thus, if someone complained that they had not received the delivery, the Respondent has documentation to establish that the delivery was made. DeAndrade further explained that the scanner has a feature that is referred to as multiscan. A driver can use multiscan when there are multiple orders at one location. DeAndrade gave as an example that if there were seven packing slips for delivery at the same location, a driver can scan the packing slips and the scanner encompasses all the order numbers and the customer can sign once rather than seven times.

[39] The Respondent did not produce the scans at the trial and thus DeAndrade's testimony on this point is uncorroborated by any documents.

On October 7, Kershner was asked by Hallinan to prepare a written statement regarding the deliveries that he made with Brennan. Kershner's signed statement (R. Exh. 8) indicates the following:

> On 10/5/15 I was asked to help make same-day deliveries was Sean Brennan on route 307. I met with him at approximately 2:45 pm. on a street in South Boston. Upon meeting with him it became apparent that he had a very negative outlook regarding the company and how we do business. He said "same days are the most ridiculous thing we do, they suck." He also complained about the truck, the phone scanner and everything else about the company. We made several stops and then headed to the fish-pier in the seaport. We missed a stop "John Nagle Fish Co." and I saw the packages and brought it to his attention, Sean acknowledged the error, and even though the stop was only 500 yards away he drove on. We made our final deliveries around 3:55 pm. I noticed there were several stops that were not going to be done and when I asked Sean why, he replied "Same days on Morrissey Boulevard, fuck that !!!) We then returned at around 4:00 pm. In my opinion we could have made those stops in roughly 1.5 hours and been back by 5:30 pm. I felt it was my responsibility to let upper management no so I reached out and reported this to Carlos DeAndade."

Brennan testified that on Friday, October 9, he received a phone call from Carlos DeAndrade, Hallinan, and Burkowsky who were on a speaker phone. DeAndrade asked Brennan if he had ever said "I fucking hate same days" and "fuck doing same days on Morrissey Boulevard" and Brennan responded that he probably had. DeAndrade also asked him if he knew about the scanning protocol, specifically how many scans he was supposed to have on a percentage basis. Brennan replied that he did not know what the scanning protocol was. De Andrade said it was supposed to be approximately 90 percent and he was not getting it. The call ended with Brennan asking what the status of his employment was and DeAndrade replied that it was still ongoing (Tr. 388-390).[40]

According to Brennan's credited and uncontradicted testimony, approximately 10 minutes later Hallinan called him and told him that he was terminated. When Brennan asked why, Hallinan replied because of what they had just talked about 10 minutes ago. (Tr. 392.) Brennan never received anything in writing regarding the reasons for his discharge. It is undisputed that Brennan had not received any discipline from the Respondent prior to his discharge, nor had any customers complained to the Respondent regarding his delivery service.

[40] DeAndrade testified that during this phone conversation he asked Brennan about scanning errors and Brennan replied that he "basically multi-scanned his slips" and that he did not indicate that anyone at the Respondent had told him it was acceptable to do that. DeAndrade's testimony regarding this phone conversation made no mention of asking Brennan about what he said about hating same day deliveries or making same-day deliveries on Morrissey Boulevard. I credit Brennan's testimony regarding this phone conversation over that of DeAndrade. Brennan's testimony regarding being asked questions about what he said regarding same-day deliveries is inherently plausible given the fact that Kershner's October 7 statement made specific mention of Brennan's statements on those topics. In addition, the Respondent's failure to produce documents to corroborate DeAndrade's testimony regarding the alleged scans made by Brennan after he returned to the facility, convinces me that such scans do not exist and that DeAndrade's testimony on this issue is not worthy of belief.

DeAndrade testified that as a result of the investigation into Brennan's activities on October 5, he and Burkowsky concluded that Brennan should be terminated. DeAndrade and Burkowsky determined that Brennan's conduct constituted insubordination and was gross misconduct under the employee handbook, developmental discipline guidelines, section 3.9(A)(d). According to DeAndrade, Brennan's insubordination put the Respondent in a position to lose customers. DeAndrade testified that he had not encountered prior situations in which a driver had purposely failed to make same-day deliveries and clocked out at 4 p.m. After the decision to terminate Brennan was made, Hallinan was directed to make a phone call to Brennan to notify him of his termination.

There is conflicting evidence in the record regarding what, if any, instructions Pitre gave to Brennan regarding same day deliveries on Morrissey Boulevard. Brennan testified that when Pitre trained him he told him not to make same-day deliveries on Morrissey Boulevard because there was heavy traffic from 2 to 5 p.m., and making deliveries on Morrissey Boulevard would prevent him from getting to other areas and perhaps doing six or seven stops, when there would only be one or two on Morrissey Boulevard. Brennan testified that the only time he would make same-day deliveries on Morrissey Boulevard was if the order was marked "urgent." According to Brennan, when he returned to the warehouse at the end of the day, there was often product left on his truck and that he would make those deliveries the following morning. On his regular morning route, he would make stops on Morrissey Boulevard.

According to Brennan, approximately 85 percent of the time at the end of the day, Pitre would send him a text message asking him how many stops he missed. Brennan testified that he would responded to Pitre every time that he missed stops, including those on Morrissey Boulevard. Prior to October 5 no one in management had ever told Brennan that what he had been doing with same day stops on Morrissey Boulevard was inappropriate, nor had he received any discipline for failing to make such stops. [41]

Brennan testified that he carried a scanner and that he was expected to obtain a customer signature for the delivery, but that he often did not get the packing slips signed. Brennan further testified that, prior to October 9, no one in management had ever spoken to him about the fact that he did not always obtain a signature. Brennan further testified that he did not scan anything to indicate he had made deliveries when he had not. According to Brennan, if he had helper and two deliveries were made at the same stop, he would push the multiscan button on the scanner and scan both.

As noted above, Pitre testified that he never told Brennan he could skip same-day deliveries on Morrissey Boulevard. Pitre testified that drivers are instructed that, if they cannot make a delivery, to report all stops that were missed and the reason. According to Pitre, he communicates with drivers almost every day to see if stops were missed. Pitre testified that he also reviews driver logs to get an idea of what stops were missed. Pitre admitted he was aware on

[41] On October 6, after Brennan had been suspended, he received a text message from Pitre asking him how many stops he had missed that day and the day before. Brennan responded in a text message indicating, "I swear to God you better tell them we do not do mortisey blvd (sic) same days. This is Bullshit Benny." (GC Exh. 77, pp. 14-15.)

a daily basis of what deliveries were missed (Tr. 792). [42]Pitre indicated that missed same-day deliveries would be a priority for delivery the next day. However, if a same-day delivery was marked urgent it had to be delivered that day, regardless of what it took to do so. Pitre also admitted that he was aware that Brennan missed deliveries on a regular basis. (Tr. 793) Petrie also testified, however that Brennan would get most of his stops done and that he was a very fast delivery person (Tr. 801). Pitre claims, however, that he did have conversations with Brennan telling him if he was missing stops it should be because a customer was closed and not for the purpose of being back at 3 or 4 p.m.

The Respondent induced into evidence a summary that had been prepared for use at the trial, which reflected same-day deliveries for drivers on Morrissey Boulevard from October 2, 2014, through December 29, 2015 (R. Exh. 16, sheet 1). For the period from October 21, 2014, until his discharge on October 9, 2015, Brennan made 16 deliveries on Morrissey Boulevard. However, only 12 of these were same-day deliveries as 4 were made in the morning and the record establishes that same day deliveries are only made in the afternoon.[43] The Respondent also introduced a summary reflecting Brennan's time records for 2015 which show that prior to his discharge on October 9, 2015, he punched out at or before 4:30 p.m. approximately 66 times. (R. Exh. 15)

As noted above, Pitre also makes deliveries during busy times or when drivers are absent. Respondent Exhibit 16, sheet 1, also contains a summary of Pitre's deliveries on Morrissey Boulevard for the period of time noted above. This document shows that on October 14, 15, 16, and 17, 2014, November 6, 2014, and December 26, 2014, Pitre attempted to make deliveries on Morrissey Boulevard, but the summary does not reflect the time at which those delivery attempts were made, so that I cannot determine whether they were afternoon same-day deliveries. The record does reflect that in 2015, Pitre attempted to make or made 11 afternoon same-day deliveries on Morrissey Boulevard.

I credit Brennan's testimony that Pitre had indicated to him that he did not have to make same day deliveries on heavily congested Morrissey Boulevard in order to be able to achieve a greater number of deliveries overall. Brennan testified in detail regarding the circumstances under which Pitre told him he did not have to make such deliveries. His demeanor while testifying regarding this matter was convincing and his testimony was inherently plausible based on the record as a whole. I find that the email that Brennan sent to Pitre after being notified of his suspension also supports the fact that Brennan and Pitre had an understanding regarding making same-day deliveries on Morrissey Boulevard. Brennan does not strike me as one so bold as to send such an email in an attempt to compel his supervisor to support a fictitious claim. Rather, I find that the email reflects a plea from Brennan to Pitre to corroborate his truthful explanation of his conduct on October 5 to Carlos DeAndrade. As noted above, Brennan explained at the trial that he would make same-day deliveries on Morrissey Boulevard when they were marked urgent. The relatively low number of Morrissey Boulevard stops on Brennan's busy route supports that

[42] Brandao credibly testified without contradiction that his supervisor, Eric Porter also sent him a text messages asking how many stops he had missed and that Brandao always reply indicating what if any stops had been missed. Brandao further testified he has never been disciplined for missing stops.

[43] It is possible these deliveries were same-day deliveries that had not been made the previous day.

testimony. In addition, the record establishes that Pitre checked with Brennan on almost a daily basis regarding the number of stops that were missed.

I do not credit Pitre's testimony that he had never given permission to Brennan to skip same-day deliveries on Morrissey Boulevard. I recognize the difficult position that Pitre was placed in when DeAndrade asked him about Brennan's claim that Pitre had given him such permission. Pitre struck me as a dedicated, hard-working supervisor who attempted to ensure that the maximum number of deliveries were made each day.. Having an understanding with Brennan, who was admittedly a very efficient and fast delivery person, regarding making same-day deliveries on heavily congested Morrissey Boulevard, is something that I believe that Pitre did in order to better achieve the overall mission. Under these circumstances, I also do not credit Pitre's testimony that he told Brennan that the only reason that he could miss stops was because the customer was closed. As set forth above, Brennan's time records clearly reflect that during the approximately 9 months Brennan worked for the Respondent in 2015, he returned to the facility between 4 and 4:30 p.m. approximately 66 times. Thus, it was well known to the Respondent that Brennan often finished his route before 5 p.m. and, at times, returned with undelivered product. The fact that Pitre himself made 11 same-day deliveries on Morrissey Boulevard during 2015 does not detract from these findings. The record establishes that Brennan made same-day deliveries on Morrissey Boulevard that were marked urgent, and there is no evidence to establish that Pitre's deliveries on Morrissey Boulevard were anything other than urgent deliveries.

Analysis

Applying the *Wright Line* analysis to the discharge of Brennan, the General Counsel has established that Brennan was a union supporter. Brennan signed an authorization card on July 25, 2015, and thereafter attended union meetings. Brennan appeared in both photographs taken by the union of union supporters that was given to the Respondent on September 28. Brennan carried a sign in support of the Union at the rally held at the Respondent's facility on September 28 in the presence of supervisors.

I find that the Respondent had knowledge of Brennan's union support because of his appearance in the photograph of union supporters given to the Respondent on September 28 and his participation in the rally held outside of the Boston facility on September 29 in the vicinity of several of the Respondent's supervisors.

The Respondent has demonstrated its antiunion animus toward the Union and its supporters by virtue of the violations of Section 8(a)(3) and (1) that I find it committed in this case. In addition, I find that the timing of Brennan's discharge, which occurred shortly after the Respondent learned of his support for the Union, supports an inference that his discharge was motivated by his union activity, *DHL Express, Inc*., *State Plaza Hotel,* and *Toll Mfg. Co*, supra. Accordingly, I find that the General Counsel has presented a prima facie case that the discharge of Brennan was motivated by his union activity and the burden of persuasion shifts to the Respondent to demonstrate the same action would have taken place even in the absence of his protected conduct.

The Respondent contends that it discharged Brennan for lawful business reasons unrelated to his union activity. In this connection the Respondent argues that Brennan intentionally skipped same-day deliveries on Morrissey Boulevard on October 5 and told Kershner "fuck same days on Morrissey Boulevard," when Kershner questioned him about it. Respondent also contends that on the same day, Brennan returned to the facility at approximately 4 p.m. and intentionally multiscanned deliveries when he returned so that they appeared to be delivered. According to the Respondent, such conduct amounts to insubordination under the employee handbook and that no other employees had previously engaged in similar conduct.

As noted above, it is undisputed that Brennan had received no discipline prior to his discharge nor had any customers complained about his conduct to the Respondent. The General Counsel contends that there is evidence of disparate treatment in that other employees have engaged in conduct similar to that of Brennan and have been treated more leniently. In this connection, I find the record of employee Devin Allston, a former driver for the Respondent, to be relevant. On October 28, 2010, Supervisor Eddie Murphy sent an email to Hallinan, then the Respondent's regional distribution manger, regarding Devin Allston, which Hallinan forwarded to Laura Pacuilan (Sullivan,) on November 8, 2010. (GC Exh. 35, p.4) Murphy's email indicates that Devin Allston consistently came to work late. Murphy's email then indicates: "I explained to him that when he gets in late . . . he leaves the building late. . which gets him back for same days late . . which sends him out for same days late . . .which ends up in failed same day deliveries. He just does not seem to have any sense of urgency with our delivery process. I am willing to get whatever help we can for him on any given day, and I explained that to him, but he just does not seem like he is trying to help himself. There are just many simple aspects of his job that he is not following through on. I told him that he needs to fill out his log properly each day, answer his phone, and communicate with me on his progress so I can prepare to give him the help he needs. I explained to him that this was his last verbal warning about these issues and that he really needs to improve his level of performance."

On November 4, 2010, Hallinan received an email from another supervisor, James Zinchuk, regarding Devin Allston, [44] that Hallinan forwarded to Paciulan on November 8, 2010. (GC Exh. 35, p.2) This email reports that a customer told Zinchuk that Allston was always in a bad mood when he made deliveries and that the customer did not like his attitude. This email also reflects that another customer reported that "she never receives her same days once he became the driver."

On November 8, 2010, Hallinan sent an email to Pacuilan indicating that he and Dan Arone, then the branch manager, were going to have a conversation with Devin Allston the following day. Hallinan's email indicates: "Not sure if a formal written warning/PIP will result or not." Hallinan's email also reflects that the issues involved the following: Allston's general attitude; "delivery issues; failed same days; other drivers finish run when Devin is out; daily paperwork done incompletely; conversations with Goldstar (Eddy)"; and, "specific complaints from RT. 309 customers (from Jim Zinchuk.)" (GC. Exh. 35, p. 3).

[44] The record establishes that the route number driven by Devin Allston at this time was 309.

On November 11, 2010, Hallinan sent an email to Pacuilan regarding the meeting that he and Arone had with Devin Allston (GC Exh. 35, p. 5). This email does not reflect any discipline was given to Allston at the meeting.

On November 23, 2010, Murphy sent another email to Hallinan regarding Allston's poor performance on November 22 (GC Exh. 35, p. 9). Murphy's email indicates that Allston had substantial problems in completing his route despite assistance from another driver and Murphy. Murphy noted here were only five same-day deliveries made on Allston's route that day. On November 23, 2010, Hallinan forwarded Murphy's email to Pacuilan and Arone, and also noted that on November 23, Allston left a skid of 12 same-day delivery items on the dock. Hallinan added, "It is one mistake after another. I believe it is time for written warning and PIP."

On December 14, 2010, the Respondent issued Devin Allston a final written warning (GC Exh. 35, p. 10). This warning notes that in the prior 2 months there had been numerous conversations with various Respondent managers regarding Allston's overall job performance. The warning indicates that the areas of concern that were discussed included: attendance; negative attitude both with customers and management; incomplete daily driver's record; and, route productivity. The warning further notes that on December 6, 2010, the Respondent received another complaint regarding Allston's attitude when making a delivery. The warning indicates that on December 6, Allston made a delivery at a bank and when the guard asked that he remain until someone from the customer signed for it, Allston responded "We do not have to do that." When the guard explained that obtaining his signature was part of the customer's policy, Allston replied, "I do not care what they want" and left without obtaining a signature.

On September 18, 2014, Devin Allston received another final written warning.(G.C. Exh 35, p. 12.) This warning notes that he had failed to report missed stops on a consistent basis. The warning also noted that, after Allston was removed from the delivery route that he had been assigned for 4 years, within the first month, the driver who replaced him was able to improve in the following areas: arrival time for same-day pickups; overall hours worked per day; orders delivered per day; and, customer returns picked up on a timely basis. The warning further noted that a routine inspection of Allston's truck revealed cartons of undelivered product and unprocessed paperwork regarding returns.

The disciplinary record of Andrew Allston is also relevant in considering whether Brennan was treated disparately because of his union activity. On October 21, 2010, Hallinan sent an email to Arone and Paculian regarding a discussion that had been held between Hallinan, Murphy, Clifford, and Allston regarding Allston's performance (GC Exh. 38, p. 1). Hallinan's email notes that that the discussion involved Allston's route (310) having the highest level of customers not signing a delivery manifest. Allston was instructed to get signatures and, if that was not possible, to indicate clearly whether the product was delivered if the person was not available to sign for it. The email also notes that on October 19, there were 15 failed deliveries on Allston's route and that Clifford had made numerous attempts to call Allston in the afternoon to see if someone could help him. Allston had his phone off and did not initiate a call to seek assistance. Allston was instructed to keep his phone on and call in when he was unable to complete a number of deliveries. The email further notes that there was also discussion of returns not being consistently picked up on Allston's route. The email reflects that Allston had been discarding credit slips rather than sending them to customer service for correction. Allston was

instructed to indicate "customer changed mind-with a specific name" on credit slips when merchandise is not going to be returned and those slips needed to go to customer service.

On February 18, 2011, Hallinan sent another email to Paculian noting that Andrew Alston's phone issues were becoming "a big problem" and that Hallinan had left him several messages and phone calls without receiving an answer or a call back. On March 29, 2011, emails from a sales representative and Murphy were sent to Hallinan reflecting that Allston was having a problem in delivering same-day orders to a restaurant that was open until 1 a.m. Murphy's email noted that there was no reason that such orders should not be delivered every day since the restaurant does not close until 1 a.m. (GC Exh. 38, p. 4.)

On April 19, 2011, Andrew Allston was given a written warning. (GC Exh. 38 p. 6) The warning notes that in the past few months there were numerous conversations with him regarding his job performance involving Clifford, Hallinan and Arone. The areas of concern included: failing to use his company phone consistently; failing to consistently get customer signatures for deliveries; and failing to complete the daily pickup logs and indicating that they had been signed when they had not been.

On July 25, 2011, Andrew Allston was given a final written warning (GC Exh. 38, p. 9). This document reflects that he had received a written warning involving his overall job performance on April 14, 2011. The final written warning also notes that on June 30, 2011, Carlos DeAndrade again discussed with him his failure to complete daily driver logs and on July 8, 2011, Hallinan reiterated the importance of completing all forms on a daily basis during a driver meeting. It further notes that on July 19, 2011, Supervisor Clifford ran Andrew Allston's route and the following areas of concern were discovered: no daily driver logs completed for July 18; eight same-day deliveries were left on the truck and, without the driver log, there was no way to notify the customers of the delivery; a number of returns, including a delivery to a customer that was referred to in his April 14 written warning, were left on the truck; a printer with no documentation was on the truck; and driver manifests and packing lists from as far back as May 2011 were on the truck.

I find that the Respondent has not met its burden under *Wright Line* to establish that it consistently and evenly applied its disciplinary rules, *DHL Express, Inc*., supra; *Septix Waste, Inc*., supra. As noted above, it is undisputed that Brennan had no prior discipline or customer complaints prior to his suspension on October 6. The Respondent suspended Brennan after learning that he failed to make four same-day deliveries on one occasion. The Respondent discharged him on October 9 allegedly for that conduct, along with a single statement he made to Kirschner about making same-day deliveries on Morrissey Boulevard and, according to Brennan's credited testimony, not achieving a sufficient percentage of scans reflecting that deliveries were made.

In assessing whether the Respondent's discharge of Brennan for these asserted reasons is consistent with its prior disciplinary policy, the treatment given to Devin Allston is instructive. As set forth in detail above, on December 14, 2010, Allston was given a final written warning. Prior to receiving that warning, on September 9, 2010, a customer complained to the Respondent that she never received her same day deliveries once Allston began to deliver her products and that he had a poor attitude regarding his job.

On November 8, 2010, an email from Hallinan to Pacuilan noted that Devin Allston had substantial deficiencies in performance including: his general attitude; delivery issues including the failure make same-day deliveries; and not completing his paperwork. However, the only discipline that Devin Allston had received at that point was a verbal warning.

On November 23, 2010, the Respondent's emails reflect that Devin Allston had substantial problems in making same-day deliveries on both November 22 and 23, yet no discipline was imposed on him at that time. It was not until after Devin Allston had been the subject of yet another complaint regarding his absolute refusal to obtain a customer signature confirming the receipt of a delivery, that Allston was given a final written warning for the substantial performance deficiencies that the Respondent had memorialized regarding the conduct summarized above. On September 18, 2014, Devin Allston was given another final warning for failing to report missed stops, failing to deliver products, and not preparing the appropriate paperwork.

With respect to the Respondent's treatment of the performance deficiencies of Andrew Allston, Hallinan's email dated October 21, 2010, establishes that Andrew Allston had a substantial problem regarding obtaining customer signatures for deliveries, failing to make deliveries, consistently not picking up returns, and discarding credit slips rather than sending them to customer service for correction. On February 18, 2011, Hallinan noted Andrew Allston's persistent problems in communicating with supervisors. On March 29, 2011, the Respondent's emails noted that Allston consistently did not make same-day deliveries to a restaurant when there was sufficient time to do so. It was not until April 19, 2011, that Allston was given a written warning regarding his conduct. The warning specifically notes that in the previous months there had been several conversations with him regarding his job performance. On July 25, 2011, Andrew Aliston was given a final written warning because of continued poor performance since he had been given his written warning in April. The final written warning notes, inter alia, that despite repeated instructions to him regarding the importance of completing the appropriate paperwork, it was discovered that he had not completed his daily driver logs and that eight same-day deliveries were left on his truck and that, without the logs being complete, there was no way to notify the customers of that fact.

Devin Allston was not discharged for his persistent performance problems that included the failure to make deliveries, including same-day deliveries, displaying a poor attitude toward his job, and failure to complete the proper paperwork. Rather, the Respondent's supervisors engaged in a substantial effort to improve Allston's performance by having numerous conversations with him prior to the issuance of his first final written warning on December 14, 2010. On September 18, 2014, Devin Allston was given another final written warning for continued performance deficiencies including the failure to deliver products and appropriately process paperwork. Andrew Alston was similarly not discharged because of his persistent performance related deficiencies. In this connection, his record also reflects consistent problems regarding the failure to make deliveries, including same-day deliveries, and improper processing his paperwork. Again, the record establishes that the Respondent's supervisors had numerous discussions with him in an effort to improve his performance prior to the issuance of a written warning to him.

In Brennan's case the Respondent claims that his conduct amounted to insubordination, yet there is no evidence to establish that he refused to follow a direct order from a supervisor. I find that the Respondent's action in labeling Brennan's conduct as insubordination is a transparent attempt to make it appear that his discharge is consistent with its progressive discipline guidelines. I also find that the Respondent's claim that Brennan improperly scanned items to make it appear that he made deliveries when he had not, is not supported by any credible evidence and is a mere pretext. With respect to Brennan's conduct in failing to make four same-day deliveries on Morrissey Boulevard on one occasion and his statement to Kerschner about making same-day deliveries on Morrissey Boulevard, the Respondent summarily terminated him. The Respondent imposed discipline short of termination to Devin and Andrew Alston for their persistent problems regarding making deliveries, including same-day deliveries, and processing paperwork. In addition, Devin Allston had consistently displayed a negative attitude toward his job, including displaying such an attitude in the presence of customers. The manner in which the Respondent disciplined Devin and Andrew Allston establishes that they received disparate treatment when compared to the summary termination of Brennan. The Board has consistently found that such disparate treatment evidence reflects a discriminatory motive. *Lucky Cab*, supra; *Windsor Convalescent Center*, supra.

I note that another difference between the discharge of Brennan and the discipline imposed on Devin and Andrew Allston is the complete lack of any documentation regarding the Respondent's reasons for discharging Brennan. This establishes that his discharge did not occur according to the Respondent's normal processes, *DHL Express*, *Inc*., supra, JD slip op. at 9.

On the basis of the foregoing, I find that the Respondent has not met its burden under *Wright Line* to establish that it would have discharged Brennan if he had not engaged in union activity. Accordingly I find that Brennan's suspension and discharge violates Section 8)(3) and (1) of the Act.

The Allegations Regarding the Withholding and Granting of the Annual Wage Increase

Paragraph 21(a) of the complaint alleges that about December 2015, the Respondent withheld its employees' annual wage increases. Paragraph 21(b) of the complaint alleges that about June 1, 2016, the Respondent granted employees an annual wage increase. [45]

Paragraph 15 of the complaint alleges that Penn, beginning in October 2015, and continuing on various dates thereafter, threatened employees in order to induce them to cease supporting the Union and have it withdraw its unfair labor practice charges by: telling them that their annual wage increase would be withheld; blaming the Union for them not receiving their annual wage increase; and telling employees that granting their annual wage increase was conditioned on withdrawal of the Union's representation petition and unfair labor practice charge.

[45] Paragraphs 21(a) and (b) alleges that the Respondent's conduct violated Section 8(a)(5), (3), and (1) of the Act. In this section of the decision I will address the 8(a)(3) and (1) allegations. I will address the 8 (8)(5) allegations after addressing whether a bargaining order is warranted in this case.

Facts

From 2010 through 2014 drivers and helpers at the Respondent's Boston facility received annual wage increases which were announced in December of each year and made retroactive to the beginning of October. The Respondent's fiscal year is for the period from October 1 through September 30. The Respondent's normal practice is that the performance of drivers and helpers is reviewed annually, usually between October and December, and the wage increases are based, at least in part, on the performance review. The record contains an exhibit, General Counsel Exhibit 31a, which establishes the amount of the increase for fiscal years 2011 through 2015

In fiscal year 2011, drivers and helpers received an annual increase averaging $.78 an hour, which amounted to an average 4.4 percent increase. In fiscal year 2012 the drivers and helpers received an annual increase averaging $.60 an hour, which amounted to an average 3.3 percent increase. In fiscal year 2013, drivers and helpers received an increase of $.63 an hour, which amounted to an average 3.5 percent increase. In fiscal year 2014, drivers and helpers received an annual wage increase averaging $.68 an hour, which amounted to an average 3.67 percent increase. In fiscal year 2015, drivers and helpers received an annual increase averaging $.64 an hour, which amounted to an increase averaging 3.3 percent.

From October through December 2015 there was no formal announcement by the Respondent's supervisors to drivers and helpers about their expected annual wage increase for fiscal year 2016. On May 19, 2016, Carlos DeAndrade announced to drivers and helpers that they would soon be getting a wage increase, without giving any explanation as to why it had been delayed. This increase was made effective on May 26, 2016, and was paid retroactively to October 5, 2015 (R. Exh. 18). The annual increase for fiscal year 2016 for drivers and helpers averaged $4.18 an hour which amounted to an average 21.7 percent increase.

While there is no evidence of any formal announcement to the employees about their expected wage increase by any of the Respondent's supervisors from early October 2015 until Carlos DeAndre announced a wage increase on May 19, 2016, the General Counsel adduced evidence regarding statements made by Penn regarding this issue. Brandao testified that shortly after the Union filed its petition on September 29, 2015, he attended a meeting with Penn and Penn stated that because the Union had filed the charge against the company, the Respondent could not give the employees a raise.[46] (Tr. 570.) Brandao also testified that at the last meeting he attended with Penn in October, in response to a question from an employee, Penn stated that the employees had been "fucked over" by the Union, not the Respondent. Penn also stated that the Respondent was going to give employees a substantial raise and that everyone would be "happy" but that he could not tell them the exact amount because "that is illegal." (Tr. 575.)

Kenny DeAndrade testified that at the last meeting that he attended, Penn told the employees that the Union had blocked the election. Immediately after the meeting, while several employees were still in the room, Kenny DeAndrade asked Penn what was going to happen next. Penn replied that the Union had just blocked the election and "now the company has had their hands tied." Penn added that the Respondent could not do anything about it and that "Nobody can get any raises, like they promised you guys will get." (Tr. 194.)

[46] The charge in 01-CA-161120 was filed on October 1, 2015.

Caminero testified that one of the meetings that he attended, Penn stated that the employees could not get a raise because of the charge that the Union had filed against the Respondent. Caminero also testified that a couple days after the drivers and helpers had been advised by Carlos DeAndrade in May 2016 that they would receive their annual raise, he attended a meeting held by Penn. At that meeting, Penn stated that in the next couple of weeks the employees were going to receive their raise. Penn then mentioned a charge that had been filed against the Respondent and that the Respondent had not given them a raise earlier because it did not want to appear as if it was bribing the employees. Penn also mentioned at this meeting that some of the employees might be subpoenaed to testify at the upcoming unfair labor practice trial.

Penn testified that during the meetings that he held with employees in October 2015, there were several questions about how the collective-bargaining process would affect their upcoming wage increases. According to Penn, he told employees that he did not know what would happen and that the Respondent, "after consulting with legal counsel" would have to make a determination. (Tr. 642.) Penn explained that if the increases were guaranteed as part of the status quo, the Respondent would have to give it to employees. If the raises were not guaranteed as part of the status quo, then the determination would probably be made that they were not going to be given. Penn added that he also stated that "either way there was a possibility the union could file unfair labor practice charges." Penn further stated that if the Respondent did not give the increases, the Union had a right to say that the increases were part of the status quo and therefore withheld a benefit. If the Respondent went ahead and gave the wage increases, the Union could claim that it is a bribe and file an unfair labor practice charge. Penn told employees that the Respondent would have to make a decision on this issue after consultation with its attorneys. Penn did not specifically testify about statements that he made to employees in May 2016 regarding their annual wage increase.

For the most part, I credit the testimony of Brandao, Kenny DeAndrade, and Caminero over that of Penn regarding what he told employees about their annual wage increase. The testimony of the employee witnesses involved specific statements made by Penn. The demeanor of the employee witnesses reflected sincerity and Kenny DeAndrade and Caminero are current employees of the Respondent, making it unlikely that their testimony is false. On the other hand, Penn testified generalized fashion regarding this issue and appeared to testify in a manner he felt would support the Respondent's position.

I credit the mutually corroborative testimony of Brandao and Caminero that Penn told employees during October 2015, that because the Union had filed a charge against the Respondent, it could not give them a wage increase.[47] Based on Kenny DeAndrade's credited testimony, I find that shortly after the Union blocked the election on October 18, 2015, Penn told employees that Respondent had its hands tied and that "nobody can get any raises." I find that Penn's statements, attributing the loss of the wage increase to the Union, violated Section 8(a)(1)

[47] I do not credit, Brandao's testimony that at the last meeting he attended with Penn in October 2015, Penn stated that the Respondent was going to give employees a raise, but that he could not tell them the exact amount because that is illegal. Brandao's testimony on this point is uncorroborated and implausible in my view when I consider the evidence on this issue as a whole.

of the Act. *Times Wire & Cable Co.*, 280 NLRB 19, 31 (1986); *Center Engineering,* 253 NLRB 419, 420-421 (1980).

With respect to the complaint allegation that the Respondent unlawfully withheld the drivers and helpers' annual wage increase in December 2015, it contends that lawful business reasons supported withholding the annual wage increase. Carlos DeAndrade testified that he has the authority to make decisions regarding wage increases for supply drivers and helpers at the Boston facility. DeAndrade testified that wage increases were not given to drivers and helpers at the Boston facility in 2015 because the Respondent was not in an economic position to make any changes in the wage rates. DeAndrade explained the reasons as follows:

> December was an interesting month for W. B. Mason. Although we were growing, we had overstaffed ourselves in anticipation of the consolidation of the competition, of Staples and Office Depot. We looked at it in two different ways in which if the merger took place there would be a lot of chaos and they wouldn't be able to focus on their business. On the adverse side, the merger was blocked. They would have to kind of go back to the drawing board and there would be a lot of customers that would be available for us to capture. Due to the fact that the timeline which we thought that would come to fruition hadn't taken place as soon as we thought, we were overstaffed and profitability wasn't where we needed it to be. Therefore, we weren't in a position to make any changes. In fact, we had to do a reduction in force companywide to stabilize ourselves and look at the forecast for the next 90 days as to how this was going to play out with the SEC and the Staples and Office Depot merger. (Tr. 865.)

The Respondent did not provide any documentary evidence to corroborate DeAndrade's explanation regarding why he decided not to give drivers and helpers their annual wage increase in December 2015. On its face, DeAndrade's testimony claims that the failure to grant the annual wage increase to drivers and helpers in December 2015 was because the "profitability was not where we needed it to be" and the facility was overstaffed. In the normal course of things, DeAndrade's testimony, if true, would be supported by records kept in the ordinary course of the Respondent's business. Because DeAndrade's testimony is completely uncorroborated by any documentary evidence regarding the Respondent's profitability at the Boston facility in December 2015, or the claimed reduction in force companywide, I do not credit it.

Analysis of the Respondent's Withholding of the December 2015 Wage Increase

The Board has long held that "The legality of withholding a wage increase turns on whether the employer is manipulating benefits in order to influence its employees in an election." *Times Wire & Cable Co*., supra, at 29. In *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001) the Board noted:

> It is well established that an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene . . . An exception to this rule, however, is that an employer may postpone such a wage or benefit adjustment so long as it "[makes] clear" to employees that the adjustment would occur whether or not they select a union, and that the "sole purpose" of the

> adjustment's postponement is to avoid the appearance of influencing the election's outcome
>
> *KMST-TV, Channel 46*, 302 NLRB 381, 32 (1991), quoting *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). "[I]n making such announcements, however, an employer must avoid attributing to the union 'the onus for the postponement of adjustments in wages and benefits,' or disparag[ing] and underm[ing] the [union] by creating the impression that is stood in the way of their getting planned wage increases and benefits.''' *Atlantic Forest Products*, supra at 858, quoting in part *Uarco, Inc.*, 169 NLRB 1153, 1154 (1969).

In the instant case, prior to December 2015, the Respondent had at least a 5 year practice of announcing wage increases for drivers and helpers in December that were retroactive to October. It is undisputed that in 2015 the Respondent did not make any formal announcement to employees regarding the expected wage increase after the Union filed its petition. It is also undisputed that the Respondent did not grant employees the expected wage increase in December 2015. I find that the Respondent's explanation for its decision not to grant the expected wage increase to be totally unpersuasive, since it is not corroborated by any business records regarding the profitability of the Respondent's Boston facility in December 2015, or a claimed reduction in force companywide that had an effect on the Boston facility. Thus, the only credible evidence regarding the Respondent's explanation for the denial of the wage increase in December 2015 is the credited testimony of the employee witnesses establishing that the Respondent, through Penn, attributed to the Union the employees' failure to receive their expected annual wage increase. The evidence clearly establishes that the Respondent did not proceed with the expected wage increase as if the Union were not on the scene. Rather, the Respondent manipulated the expected increase in order to diminish employee support for the Union. Under these circumstances, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by its failure to implement the annual wage increase to drivers and helpers in December 2015. *Aluminum Casting & Engineering Co*., *Inc.,* 328 NLRB 8 (1999), enfd. 230 F.3d 286 (7th Cir., 2000); *Times Wire & Cable Co*., supra, at 19, 31.

Analysis of the Respondent's Granting of the Wage Increase in May 201

As noted above, on May 19, 2016, Carlos DeAndrade told employees that they would soon receive a wage increase without giving any explanation as to why it was delayed from its normal implementation date of the previous December. According to the credited and uncontradicted testimony of Caminero, shortly after DeAndrade announced that employees would receive their wage increase, Penn met with employees and reiterated that the employees would soon receive their wage increase. Penn stated that the Respondent had not given them the raise earlier because it did not want to appear as if it was bribing them, because a charge had been filed against it by the Union. At the same meeting Penn also mentioned that some of the employees might be subpoenaed to testify at the upcoming unfair labor practice trial.

The General Counsel contends that granting a much larger than normal increase on the eve of the unfair labor practice proceeding, coupled with Penn's statements, establishes that the Respondent's conduct was intended to dissuade employees from supporting the Union in violation of Section 8(a)(3) and (1).

In defense of this allegation, the Respondent relies on the testimony of Carlos DeAndrade and supporting documents to contend that the timing of the increase was warranted by normal business considerations. As noted above, DeAndrade makes the determination as to when wage increases are given to supply drivers and helpers. DeAndrade testified that wage increases were given to the warehouse employees in January 2016 because January is a profitable month for the Respondent and, since the warehouse employees constitute a large group, the increase was better absorbed in the Respondent's profit and loss statement. DeAndrade further testified that a smaller group composed of sign engravers, stamp makers and the coffee bench technicians \was granted an increase in March. DeAndrade testified that the final group, the supply drivers and helpers, was granted an increase in May, which was inherently a better month for Respondent to absorb the cost of the increase in its profit and loss statement. When specifically asked why May was a better month to grant the increase, DeAndrade responded that "The amount of days in the month is better for us. We have more days for the-business days." (Tr. 955) The Respondent introduced an exhibit,(R. Exh. 18), which is a summary reflecting the dates that wage increases were given to employees at the Boston facility. This document supports DeAndrade's testimony with respect to when such increases were given. There is nothing in DeAndrade's testimony, however, to explain the unprecedented size of the annual wage increase given to supply drivers and helpers and May 2016.

In further support of its position that the timing of the wage increase was not discriminatorily motivated, the Respondent also relies on the fact that the nine furniture drivers who work at the Respondent's facility, received a wage increase effective on September 28, 2015, that averaged $3.97 an hour and amounted to an average increase of 21.71 percent. (R. Exh. 19.) The furniture drivers are not part of the requested bargaining unit and are not supervised by Carlos DeAndade, who had no role in the timing and the amount of the increase given to furniture drivers. The Respondent argues that the wage increase granted to furniture drivers ,which was determined before the Respondent became aware of the union campaign and was commensurate in its size with the raise given to supply drivers and helpers, is further evidence of the lawful nature of the wage increase given to supply drivers and helpers.

As noted above, *Donaldson Bros. Ready Mix, Inc*., supra; *Manorcare Healthcare Services-Easton*, supra; and *Latino Express, Inc*., supra, clearly hold that it is the Respondent's burden to establish that it would have granted the wage increase to supply drivers and helpers in late May 2016, for reasons unrelated to the union organizing campaign. While the Respondent's granting of an annual wage increase is part of an established policy, I find that the precise timing of the increase, coupled with its unprecedented size, establishes that it was motivated to discourage employees from supporting the Union.

In the first instance, DeAndrade's testimony regarding the reason that the wage increase was given in late May 2016, is simply not worthy of belief. DeAndrade testified, in essence, that the increase was given in May because that month has 31 days and thus the Respondent is better able to absorb the increased cost. I take administrative notice of the fact that the months of January, March, July, August, October, and December also have 31 days. DeAndrade did not adequately explain why May, rather than any of those months, was the time chosen to implement the delayed wage increase. I find that the timing of the increase was motivated by the fact that the Respondent had reason to believe that several current employees would be subpoenaed to

testify at the instant unfair labor practice trial which was scheduled to begin on June 13, 2016, and to remind them that the "source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co*., 375 U.S. at 409.

Support for this finding is found in Penn's statement to employees reiterating that they would be receiving a wage increase, while at the same time noting that some of them might be subpoenaed to testify at the trial. I also note that the size of this wage increase was substantially larger than any previous increase given to supply drivers and helpers. I find that the timing and size of the wage increase supports the message that the Respondent consistently sent to employees throughout the union campaign, that they would be better off casting their lot with the Respondent, rather than continuing to support the Union.

While the Respondent gave a similarly large wage increase to furniture drivers on the very date that the Union presented its petition to the Respondent, I draw the inference that the decision to grant such an increase was made prior to that date, and thus the Union could have not played a role in that decision. I note, however, that the Respondent produced no evidence indicating what economic factors supported such a large increase to furniture drivers, and whether such an increase was a common or uncommon occurrence.

Applying the principles expressed in the cases cited above, I find that the Respondent has not established a lawful business reason, unrelated to the Union's organizing campaign, for the timing and size of the wage increase given to drivers and helpers on May 26, 2016. Rather, I find that the Respondent manipulated the timing and size of this benefit in order to discourage employees from supporting the union. Accordingly, I conclude that by granting the wage increase on May 26, 2016, the Respondent violated Section 8(a)(3) and (1) of the Act.

The Alleged June 1, 2016 Interrogation

Paragraph 12(c) of the complaint alleges that about June 1, 2016, Carlos DeAndrade interrogated employees about their union activities.

As noted above, Kenny DeAndrade was employed in the stamps department at the Respondent's Boston facility at the time of hearing. DeAndrade had formerly been a supply driver but had transferred to the stamps department in February 2016. Kenny DeAndrade testified that when the other employees in the stamps department received a raise in March 2016, he did not receive one. Kenny DeAndrade spoke to his supervisor, Capello, and asked him whether he would get a raise at that time or whether he would have to wait until the supply drivers received one. Capello replied that he did not know and would have to talk to Carlos DeAndrade or Meath about it. Capello explained to DeAndrade that since he had not been in the stamps department for the whole year, Capello could not do his review. After not hearing anything from Capello, in approximately early April 2016, Kenny DeAndade sent a text message to Carlos DeAndrade. In the text message, Kenny DeAndrade asked Carlos DeAndrade if would be able to get a raise because the other stamps employees had received one and he was not driving a truck anymore. Carlos DeAndrade responded that he would have to talk to his "boss" and that he would get back to him. Kenny DeAndrade did not hear anything further from Carlos DeAndrade at that time.

Kenny DeAndrade further testified that he later sent a text message to Carlos DeAndrade informing him that he had received a subpoena from the Labor Board requiring him to come to court on June 13. Later that same day, Carlos DeAndrade called Kenny DeAndrade and asked him if he would meet him at the packing station in the warehouse. When Kenny DeAndrade arrived, Carlos DeAndrade told Kenny DeAndrade that he would be able to get his raise and that Carlos DeAndrade had just received approval for it. When Kenny DeAndrade asked Carlos DeAndrade him how much it was going to be, he said that he would let him know. Carlos DeAndrade then asked him whether he had received a "letter" from the Labor Board. Kenny DeAndrade replied that he had and that it was in his car. Carlos DeAndrade then asked him if he could see it. Kenny DeAndrade replied that he could and they walked to his car and he gave Carlos DeAndrade his subpoena. Carlos DeAndrade then asked him if he knew any reason as to why he was subpoenaed. Kenny DeAndrade replied that he did not know but also said, "probably because I got moved to stamps and they might think I got forced to move to that department."

Carlos DeAndrade testified that since Kenny DeAndrade had transferred to the stamps department he asked him on several occasions whether he was going to receive a wage increase. Carlos DeAndrade testified that he initially told Kenny DeAndrade that he would look into it and get back to him. Carlos DeAndre testified that approximately 2 weeks before the June 13 NLRB hearing, he told Kenny DeAndre that he would be getting an increase but that he was unsure of when it was going to go into effect or what the amount would be.

Carlos DeAndrade further testified that a week or two before the NLRB hearing, he received a text message from Kenny DeAndre indicating that he had received a "letter" to appear at the hearing. According to Carlos DeAndrade, he contacted Kenny DeAndrade and asked him to meet him at the packing station in the warehouse. According to Carlos DeAndrade, Kenny De Andrade told him that he was nervous about receiving the letter and that Carlos DeAndrade replied that if he had received a subpoena, he had to appear and there was nothing that he could do except show up. Carlos DeAndrade testified that Kenny DeAndrade then asked him if he wanted to see the letter and Carlos DeAdrade replied that he would look at it, if that was something that Kenny DeAndrade wanted him to do. Kenny DeAndrade said that he would like him to see it and that it was in his car. According to Carlos DeAndrade, they walked to Kenny DeAndrade's car and Kenny DeAndrade gave him his subpoena, which indicated that he was to appear on June 13 at 10 a.m. Carlos DeAndrade testified that he told Kenny DeAndrade to stop being nervous about it and just tell the truth. Carlos DeAndrade denied that he ever asked Kenny De Andrade what he would testify about.

I credit the testimony of Kenny DeAndrade over the testimony of Carlos DeAndrade. Kenny DeAndrade testified consistently on both direct and cross-examination. Kenny De Andrade emphatically denied on cross-examination that he offered to show Carlos DeAndrade his subpoena and steadfastly maintained that Carlos DeAndrade asked to see it. Kenny De Andrade's demeanor while testifying regarding this issue reflected certainty and a sincere desire to testify truthfully. In addition, Kenny DeAndrade was employed by the Respondent at the time of the hearing making it unlikely that he would testify falsely against the interest of the Respondent.

Applying the standard set forth in *Intertape Polymer Corp*., supra, I find that Carlos DeAndrade's request to see the letter that Kenny DeAndrade's had received from the NLRB and his questioning of him regarding why he thought he was subpoenaed was coercive. There is substantial evidence of the Respondent's hostility to the union activity of its employees at the Boston facility. Carlos DeAndrade is the branch manager of the Boston facility, a high ranking position, and had no legitimate interest in questioning Kenny DeAndre about whether he had received a letter from the NLRB and why he thought he was subpoenaed. Accordingly, I find that Carlos DeAndrade's conduct coerced and restrained Kenny DeAndrade in the exercise of his Section 7 rights and violated Section 8(a)(1) of the Act.

The Request for a Bargaining Order Remedy

As alleged in the complaint, the General Counsel seeks a bargaining order remedy. The General Counsel contends that the Respondent's unfair labor practices impacted employees to the extent that the possibility of assuring a fair rerun election by the use of traditional remedies is slight. The General Counsel further argues that employee sentiment reflected by the Union obtaining majority support through authorization cards, is a more accurate reflection of the employees' desire for union representation and that employee Section 7 rights are better protected by a bargaining order pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). The Respondent contends that if it committed unfair labor practices, they are not of the magnitude to warrant a bargaining order and that traditional remedies would be sufficient to effectuate the policies of the Act.

In order to determine whether a bargaining order remedy is appropriate, I must examine initially whether the Union achieved majority status in an appropriate unit based on authorization cards. The complaint alleges that the Union obtained majority status as of September 28, 2015. Pursuant to the Stipulated Election Agreement executed by the parties in Case 01-RC-160788 (Jt. Exh. 1), the payroll period ending date for eligibility to vote in the then scheduled election at the Boston facility was September 25, 2015. The *Excelsior* [48] list submitted by the Respondent establishes that as of September 25, 2015, there were 42 unit employees employed at the Boston facility (Jt. Exh. 1). The record establishes that between September 25 and 28, none of the employees on the *Excelsior* list left the Respondent and no unit employees were hired. The parties stipulated that as of September 28 there were 42 employees in the unit.

The parties disagree, however, regarding whether Chery, Cobbler, and Ribeiro were bargaining unit employees on September 28, 2015. The Respondent contends that those three employees were seasonal employees, without a reasonable expectation of continued employment, and thus should not be considered as bargaining unit employees. The General Counsel asserts that the three employees were regular employees and part of the bargaining unit on that date. Ribeiro, Chery, and Cobbler performed the same work as the other unit employees and worked the same hours under the same supervision. There is no evidence that they were ever informed that were hired as seasonal employees. The mere fact that the Respondent's internal records referred to them as "seasonal" does not outweigh the evidence that these three employees shared a substantial community of interest with other bargaining unit employees. I find that Chery, Cobbler, and Ribeiro were regular employees with a continued expectation of

[48] *Excelsior Underwear,* 156 NLRB 1236 (1966).

employment and therefore part of the bargaining unit on September 28, 2015. Accordingly, there were 45 the employees in the bargaining unit on that date.

At the trial, the General Counsel properly authenticated, by testimony from either the solicitor or the card signer, the authorization cards of 30 bargaining unit employees, including Chery, Cobbler, and Ribeiro, who had signed their cards before September 28, 2015. In its brief, the Respondent does not contest the validity of any of those cards. I find that all 30 authorization cards are valid and can be relied on in establishing the Union's majority status. Thus, the Union had obtained 30 valid authorization cards prior to September 28, 2015, from employees who were in the bargaining unit as of that date. Accordingly, as of September 28, 2015, the Union had clearly attained majority status in the bargaining unit.

With regard to whether it is appropriate to issue a bargaining order in the instant case, the Board's decision in *Evergreen America Corp.,* 348 NLRB 178, 180 (2006), indicates:

> The Board will issue a *Gissel* bargaining order in two categories of cases. The first category comprises "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. *NLRB v. Gissel Packing*, [395 U.S. 575, 613 (1969)]. The second category (category II) includes "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." Id. at 614.

While the unfair labor practices committed by the Respondent are extensive, I find that it is best defined as a category II case. In such cases, the Board evaluates the "extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and a likelihood of their recurrence in the future" in determining whether a bargaining order remedy is appropriate. *Gissel*, supra at 614; *Evergreen America Corp*., supra at 180.

In *Horizon Air Services*, 272 NLRB 243 (1984), the Board noted that certain unfair labor practices are so coercive that they are characterized as "hallmark" violations and that their "presence will support the issuance of a bargaining order unless some significant mitigating circumstances exist." *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980). In *Jamaica Towing* the court stated that "hallmark" violations include, inter alia, the granting of benefits to employees and the discharge of employees in violation of Section 8(a)(3). The court noted that, "In such cases, that seriousness of such conduct, coupled with the fact that it represents complete action as distinguished from mere statements, interrogations or promises justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the workforce." Id. at 212-213.

In the instant case, the Respondent committed several hallmark unfair labor practices. In this regard, the Respondent laid off Chery, Cobbler, and Ribeiro on October 3, 2015, in violation of Section 8(a)(3) and (1). The Respondent additionally violated Section 8(a)(3) and (1) by suspending Becerra on October 5 and discharging him on October 6, and suspending Brennan on October 6 and discharging him on October 9. The Board has long held the discharge of a union supporter is one of the most flagrant forms of interference with Section 7 rights and is more

likely to destroy election conditions for a longer period of time than other unfair labor practices because it tends to reinforce the fear of employees that they will lose their employment if they persist in engaging in union activity. *Michael's Painting, Inc*., 337 NLRB 860, 861 (2002); *California Gas Transport, Inc*., 347 NLRB 1314, 1323-1324 (2006); *A.P.R.A Fuel Oil*, 309 NLRB 480, 481 (1992). See also *Thriftway Supermarket*, 276 NLRB 1450, 1451 (1985), enfd. 808 F.2d 835 (4th Cir. 1986).

The Respondent committed another hallmark violation in granting a wage increase to all bargaining unit employees on May 26, 2016, the timing and size of which was designed to discourage them from supporting the Union in violation of Section 8(a)(3) and (1.) The Board recognizes that unlawful wage increases, in particular, have a potential long-lasting effect because of their significance to employees and because the Board's traditional remedies do not normally require a respondent to withdraw benefits it has conferred. *America's Best Quality Coatings Corp*., 313 NLRB 470, 472 (1993); *Holly Farms Corp*., 311 NLRB 273, 281-282 (1993); *Pembrook Management*, 296 NLRB 1226, 1228 (1989). [49]

The Respondent began to commit unfair labor practices immediately after the Union requested recognition from the Respondent on September 28, 2015. Beyond the hallmark unfair labor practices noted above involving the layoffs of Chery, Cobbler, and Ribeiro and the suspensions and discharges of Becerra and Brennan, the Respondent committed numerous other unfair labor practices during the 3 weeks after the Union's request for recognition. In this connection, during this period the Respondent committed the following violations of Section 8(a)(1): creating the impression of surveillance of the employees' union activity; soliciting grievances from employees and implicitly offered to remedy them; interrogating employees; threatening the loss of direct access to it if the Union was selected as a bargaining representative; informing employees of the futility of selecting the Union as a bargaining representative; offering employees' transfers, raises, and promotions; and informing employees they would not receive their expected annual raise while attributing the lack of a raise to the Union. During this period, the Respondent also violated Section 8(a)(3) and (1) by granting benefits to employees by improving the efficiency of the warehouse and delivery routes and assisting employees in the performance of their duties. Shortly thereafter, in December 2015, the Respondent violated Section 8(a)(3) and (1) by failing to grant the drivers and helpers their expected annual wage increase.

In determining the pervasiveness of an employer's unfair labor practices the Board considers as relevant factors; the number of employees directly affected by the violation; the size of the unit; the extent of the dissemination among employees; and the identity and position of the individuals committing the unfair labor practices. *Garvey Marine, Inc.,* 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (1993); *Holly Farms Corp*., supra at 281.

The bargaining unit is not large, consisting of 45 employees. Thus, the layoff of three employees and the discharge of two employees in violation of Section 8(a)(3) and (1) in a unit that size would have a severe and lasting impact on the remaining employees. I also note that the

[49] It is only when benefits are conferred unilaterally in violation of Section 8(a) (5) and (1) that the Board orders that the employer must, on request of the union, rescind the unilaterally conferred benefits. *Washington Beef, Inc*., 328 NLRB 612, 613 (1999).

Respondent began its campaign of unfair labor practices immediately after being informed of the Union's campaign, thus sending a clear message that it would not tolerate union support among the bargaining unit employees. See *California Gas Transport, Inc*., supra at 1324. In addition, the unfair labor practices committed by the Respondent involving improving the efficiency of the warehouse and delivery routes and assisting employees in the performance of their duties in October 2015; withholding the annual wage increase expected in December 2015; and granting the wage increase in May 2016, affected every unit employee in a highly significant way. In this regard, there is clear evidence regarding the impact of the unlawful assistance that the Respondent provided to employees in order to dissuade them from supporting the Union. On October 30, 2015, former union supporter Coppola sent the following text messages to Carlos DeAndrade (GC Exh. 78, p. 14):

> . . . [y]ou are fixing all the problems and kicking ass daily. It is a happy place to be every day I honestly love it. Just want you to know I am grateful to have a boss like you. It is rare in this world.
>
> I appreciate the huge efforts and mountains you have moved on our behalf. It really has made work a better place.

On November 25, 2015, Coppola sent the following text message to Carlos DeAndrade:

> We are all thankful for the way you have turned this thing around and made work a happier place. I hope you know how much we appreciate you and the other guys who have came (sic) down to help out.

The Board has noted that unfair labor practices that affect all unit employees is a factor strongly supporting the granting of a bargaining order. *Evergreen America Corp*., supra, at 180-181.

There is also substantial evidence of dissemination among employees of some of the unfair labor practices committed by the Respondent in text messages sent by employees in the "Still United" group and other text messages contained in the record. In these text messages, employees informed each other about the unlawful offers of promotions, raises, and transfers being made to some union supporters. Employees also informed each other about statements that were made by the Respondent's supervisors regarding the union campaign.

The coercive and long-lasting effect of the Respondent's unlawful conduct is further established by the fact that many of the violations were committed by high ranking management officials. Boston Branch Manager Carlos DeAndrade, the highest ranking supervisor at the Boston facility with day-to-day authority over unit employees, figured prominently in the commission of many of the Respondent's unfair labor practices. In this regard, DeAndrade made the decision to lay off Chery, Cobbler and Ribeiro and, together with Burkowsky, made the decision to terminate Becerra and Brennan. DeAndrade also made the decision to withhold the expected December 2015 annual wage increase and to grant the wage increase in May 2016. In addition, DeAndrade committed a number of the 8(a)(1) violations. The Respondent's chief operating officer, Meehan, violated Section 8(a)(1) by telling a group of employees on the very day that the Union filed its representation petition that the Respondent would find out who was

behind the filing of the petition. The Board has noted that the involvement of high-level managers in the commission of unfair labor practices " . . . is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." *California Gas Transport, Inc*., supra at 1324 and cases cited therein.

The effect of the Respondent's initial wave of unfair labor practices committed in early October 2015, is demonstrated by the rapid dissipation of union support. As noted above, by September 28, 2015, the Union had obtained 30 valid authorization cards. On October 15, 2015, the near complete erosion of employee support for the Union is demonstrated by the fact that formerly strong union supporters, Coppola, Pina, and Edwards presented a petition to the Union requesting it to withdraw its representation petition and unfair labor practice charges.

While the Respondent's initial unlawful response to the Union's campaign substantially eliminated employee support for the Union, the Respondent continued to commit unfair labor practices and thus remind employees that it was not in their interest to continue to have any support for the Union. In this regard, the Respondent's failure to grant employees the expected annual wage increase in December 2015, further emphasized its disapproval of the employees' interest in the Union in a most significant way. In May 2016, the Respondent granted the unit employees an annual wage increase that was unprecedented in size and delivered at a time when several of the unit employees were receiving subpoenas to attend the then upcoming unfair labor practice trial. Such conduct was a reminder to employees that it was to their benefit to support the Respondent and not the Union. Finally, in late May 2016, the Respondent, through Carlos DeAndrade, violated the Act by questioning an employee about the subpoena that he received to attend the hearing.

In summary, the Respondent met the Union's organizing campaign with the commission of serious unfair labor practices, including hallmark violations, that were sustained from when the Respondent first learned of the Union's organizing campaign on September 28, 2015, until late May 2016, just before the commencement of the instant unfair labor practice trial. Several of the Respondent's violations affected the entire bargaining unit and emanated from high-level management officials. The initial unfair labor practices clearly affected the employees' desire for union representation, since 30 employees signed authorization cards prior to the Union's request for recognition on September 28, 2015, but by October 15, 2015, 30 employees signed a petition requesting the Union to withdraw its representation petition and pending unfair labor practice charges. Under these circumstances I do not believe that that requiring the Respondent to refrain from its unlawful conduct and the reinstatement and payment of back pay to Chery, Cobbler, Ribeiro, Brennan, and Becerra will eradicate the lingering effects of the unfair labor practices committed, nor will it sufficiently deter their recurrence. Rather, I find that the employees representational desires, expressed through authorization cards, would be better protected by a bargaining order. Thus, because I conclude that is not likely that a fair election can be held because of the lasting effect of the Respondent's violations of the Act, I find that a bargaining order is an appropriate remedy in this case. Therefore, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the majority representative of its employees by virtue of its commission of serious unfair labor practices which undermined the Union's majority status and prevented the holding of a fair election. Since the Union had obtained majority status and orally requested recognition on September 28, 2015, the same date that the Respondent began to commit unfair labor

practices, I shall date the bargaining order as of September 28, 2015, consistent with the Board's policy on this issue. *Chosun Daily News*, 303 NLRB 901 fn. 3 (1991); *Trading Port, Inc*., 219 NLRB 298, 301 (1975).

I find the cases relied on by the Respondent in arguing that a bargaining order is not an appropriate remedy for any unfair labor practices it may have committed to be distinguishable from the instant case. In *Hialeah Hospital*, 343 NLRB 391 (2004), the bargaining unit that the union sought to represent was comprised of 12 employees. After learning of the Union's campaign, the employer committed a number of number of violations of Section 8(a)(1), and violated Section 8(a)(3) and (1) by discharging one employee and removing the benefits of a shower and ping-pong table. Under these circumstances, the Board found that a bargaining order remedy was not appropriate and that traditional remedies, including a direction of a second election, would ameliorate the effects of the employer's unfair labor practices. In the instant case, the withholding of a benefit was far more serious, since it involved an expected annual wage increase. In addition, there are other significant unfair labor practices that affected all of the unit employees including implementing procedures and personnel to assist bargaining unit employees in performing their jobs in October 2015 and granting the wage increase in May 2016. I find that the type and number of the unfair labor practices that occurred in the instant case are sufficient to distinguish it from the situation presented in *Hialeah Hospital*.

In *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004), the Board agreed with the administrative law judge that a bargaining order was not warranted and that a rerun election, in conjunction with special remedies, would be a sufficient remedy for the unfair labor practices that occurred. The Board noted, however, in adopting the administrative law judge's conclusion that a bargaining order was not warranted, "we do not necessarily adopt his entire rationale." Id. at 1069. Thus, it is unclear as to what part of the administrative law judge's rationale was relied on by the Board in reaching its conclusion.

In *Jewish Home for Elderly of Fairfield County*, supra, the respondent granted an unlawful wage increase, and discharged one primary union supporter shortly before the election and another union supporter approximately 3 months after the election. The respondent also committed a substantial number of other unfair labor practices. However, the bargaining unit was large, encompassing approximately 400 employees, and some of the high-ranking officials of the employer who had committed unfair labor practices were no longer employed by the respondent by the time the unfair labor practice hearing was held. Thus, there are substantial factual distinctions between *Jewish Home for the Elderly of Fairfield County* and the instant case. When I consider those distinctions in conjunction with the uncertainty that exists regarding precisely what part of the administrative law judge's rationale for refusing to grant a bargaining order the Board relied on, I do not find that *Jewish Home for the Elderly of Fairfield County* requires me to refuse grant a bargaining order remedy case in the instant case. Rather, I find the cases that I have relied on above to be the more persuasive precedent.

The 8(a)(5) and (1) Allegations regarding the Withholding of the Annual Wage Increase in December 2015 and the Granting of the Wage Increase in May 2016

As set forth above, I find that the Respondent's conduct with respect to both of these issues violated Section 8(a)(3) and (1) of the Act. As I noted earlier, the complaint also alleges

that the Respondent's conduct with respect to these matters also violated Section 8(a)(5) and (1) of the Act.

For the reasons set forth above, I find that as of September 28, 2015, the Respondent was obligated to bargain with the Union. It is undisputed that in December 2015, the Respondent did not grant the bargaining unit employees the annual wage increase they had been receiving at that time for the past 5 years and that it did so without giving notice and an opportunity to bargain to the Union. It is clear that an employer violates Section 8(a)(5) and (1) if it unilaterally changes a mandatory subject of bargaining, such as wages, without first providing the employees' bargaining representative notice and an opportunity to bargain, *NLRB v. Katz,* 369 U.S. 736 (1962). Applying the principles of *Katz*, the Board has long held, with court approval, that after a union is selected as the bargaining representative, an employer may not unilaterally discontinue the practice of granting periodic wage increases to its employees. *United Rentals*, *Inc*., 349 NLRB 853 (2007); *Jensen Enterprises, Inc*., 339 NLRB 877 (2003); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). In the instant case, the Respondent's practice of granting an annual wage increase to unit employees in December was well established and thus a condition of employment that required bargaining before it could be changed. Accordingly, I find that the Respondent's unilateral action in failing to grant employees an annual wage increase in December 2015, violated Section 8(a)(5) and (1) as alleged in paragraph 21(a) of the complaint.

I also find that the Respondent's unilateral action in granting the annual wage increase in May 2016, also violates Section 8(a)(5) and (1) of the Act as alleged in paragraph 21(b) of the complaint. In *Oneita Knitting Mills*, 205 NLRB 500, fn. 1 (1973), the Board noted that an employer with an existing practice of granting a wage increase must bargain with a union, which has been selected as the bargaining representative, regarding the amount and timing of such increases. In *Washington Beef, Inc*., 328 NLRB 612, 617 (1999), the Board found that a unilateral wage increase to employees violated Section 8(a)(5) and (1). In so finding the Board noted " . . . the vice of the unlawful unilateral change is a change in existing employment conditions itself, and whether the change involves an increase or a decrease, a continuation or discontinuance, or an alteration or modification is simply not determinative." (Citations omitted) Id. at 617.

CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by

(a) Soliciting grievances and impliedly promising to remedy them.

(b) Interrogating employees regarding their union activity.

(c) Threatening employees with a loss of direct access to it if the employees selected the Union as their bargaining representative.

(d) Informing employees of the futility of selecting the Union as their bargaining representative.

(e) Creating the impression that the employees' union activities were under surveillance.

(f) Offering employees transfers, raises, and promotions to employees in order to discourage them from supporting the Union.

(g) Attributing the loss of a wage increase to the Union.

(h) Interrogating an employee about his NLRB subpoena.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by

(a) Granting benefits to employees by improving the efficiency of its warehouse, delivery routes, and truck loading, and assisting employees in the performance of their duties, in order to discourage them from supporting the Union.

(b) Laying off Kerby Chery, Jason Cobbler, and Elton Ribeiro because of their union activities.

(c) Suspending and discharging Marco Becerra and Sean Brennan because of their union activity.

(d) Withholding an expected annual wage increase from employees in December 2015 in order to discourage them from supporting the Union.

(e) Granting a wage increase to employees in May 2016 in order to discourage them from supporting the Union.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by

(a) Since September 28, 2015, failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time time supply drivers, supply driver helpers, and supply shuttle drivers employed by the Employer at its Summer St., South Boston, Massachusetts facility, but excluding all other employees, managers, guards, and supervisors as defined in the Act.

(b) Unilaterally failing to grant an annual wage increase in December 2015.

(c) Unilaterally granting an annual wage increase in May 2016.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily laid off Kerby Chery, Jason Cobbler, and Elton Ribeiro, and having suspended and discharged Marco Becerra and Sean Brennan, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Chery, Cobbler, Ribeiro, Becerra, and Brennan for search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No.10 (2014), the Respondent shall compensate Chery, Cobbler Ribeiro, Becerra, and Brennan for the adverse tax consequences, if any of receiving lump-sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143, (2016), the Respondent shall file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay to the appropriate calendar year for each employee.

As noted above, I found that the Respondent withheld an expected wage increase in December 2015, and then granted the wage increase in May 2016, in order to manipulate the granting of the wage increase to discourage employee support for the Union. I found the Respondent's conduct in both instances to violate Section 8(a)(3) and (1). Since this conduct occurred after the date I find that it is appropriate to date the bargaining order, I also found the Respondent's conduct violated Section 8(a)(5) and (1). The Board's traditional remedial approach regarding an unlawful failure to grant a wage increase is to provide that such a wage increase be retroactively granted, with interest. *United Rentals, Inc*., 349 NLRB 853, 864 (2007); *Aluminum Casting & Engineering Co.,* 328 NLRB 8, 10, 27 (1999); *Times Wire & Cable Co.*, 288 NLRB 19, 20, 39 (1986).

The Board's traditional remedy for granting a wage increase in violation of Section 8(a)(5) and (1) is to, upon the request of the union, order rescission of the wage increase, and require the parties to bargain over the matter. *Washington Beef, Inc*., 328 NLRB 612, 613, 621 (1999).

As noted above, in the instant case, practical effect of the unfair labor practices was to first delay the granting of the wage increase to unit employees, and then grant a substantially larger wage increase than had historically been granted. Thus, employees who were employed in the bargaining unit in both December 2015 and late May 2016, received a wage increase

retroactive to October 5, 2015, that was far in excess of what they had previously received. While it is possible, I find that it is unlikely that the Union will request the Respondent to rescind the wage increase. Nevertheless, consistent with Board precedent, I will order the Respondent to do so, if the Union so requests, so that the parties may bargain over this issue. It is clear, however, that the five discriminatees were not employed by the Respondent, because of its unlawful conduct, in either December 2015 or May 2016. In addition, the record establishes that Kenny DeAndrade transferred out of the bargaining unit after December 2015, and there may be other employees who left the unit after December 2015, when the annual wage increase should have been given to employees in the bargaining unit. Accordingly, in order to ensure that all employees affected by the Respondent's unlawful failure to grant the annual wage increase in December 2015, receive an appropriate remedy, I will apply the Board's traditional remedy for such a violation and order that the Respondent make whole all employees in the bargaining unit for any loss of wages caused by the Respondent's unlawful failure to implement the annual wage increase in December 2015, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir 1971), with interest at the rate prescribed in, *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra. The exact amount of the wage increase due each employee in order to make them whole shall be determined in compliance. See *Aluminum Casting & Engineering Co.*, 328 NLRB at 27.

Because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *California Gas Transport, Inc*., supra at 1326 fn.38. *Hickmott Foods*, 242 NLRB 1357 (1979).

The General Counsel requests that I order the Respondent's branch manager, Carlos DeAndrade, to read the notice to assembled employees. I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of serious unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6-7 (2014); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 1 fn. 2 (2014); *Excel Case Ready,* 334 NLRB 4, 4-5, (2001). In this regard, the Board has held that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Federated Logistics & Operations,* 340 NLRB 255, 256 (2003), citing *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969). In the instant case, I find that the unfair labor practices of the Respondent justify the additional remedy of a notice reading. The Respondent responded to the Union's organizing campaign with extensive and serious unfair labor practices. In the first instance, as described above the Respondent engaged in numerous violations of Section 8(a)(1) of the Act. In addition, the Respondent unlawfully laid off Chery, Cobbler, and Ribeiro and suspended and discharged Becerra and Brennan. The Board has noted that the unlawful discharges of union supporters are highly coercive. *Excel Case Ready*, supra at 5. I find that a public reading of the remedial notice is appropriate here. The Respondent's violations of the Act are sufficiently serious and widespread such that a reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices. Carlos DeAndrade played an important role in effectuating the unfair labor practices, especially in the unlawful layoffs and discharges and manipulating the timing of the annual raise to discourage support for the Union. Accordingly, I will require the attached notice to the read publicly by

Carlos DeAndrade, in the presence of a Board agent, to the Respondent's assembled bargaining unit employees. Alternatively, the Respondent may choose to have a Board agent read the notice to assembled employees in the presence of Carlos DeAndrade.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[50]

ORDER

The Respondent, W. B. Mason, Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances and impliedly promising to remedy them in order to discourage employee support for the Union.

(b) Interrogating employees regarding their union activity.

(c) Threatening employees with a loss of direct access to it if the employees selected the Union as their bargaining representative.

(d) Informing employees of the futility of selecting the Union as their bargaining representative.

(e) Creating the impression that employees' union activities are under surveillance.

(f) Offering employees transfers, raises, and promotions to employees in order to discourage them from supporting the Union.

(g) Attributing the loss of a wage increase to the Union.

(h) Interrogating an employee about his NLRB subpoena.

(i) Granting benefits to employees by improving the efficiency of its warehouse, delivery routes, and truck loading, and assisting employees in the performance of their duties, in order to discourage them from supporting the Union.

(j) Laying off, suspending, or discharging employees because of their union activity.

(k) Withholding an annual wage increase from employees in order to discourage them from supporting the Union.

[50] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(l) Granting an annual wage increase to employees in order to discourage them from supporting the Union.

(m) Failing to recognize and bargain with the Union, since September 28, 2015, amazing as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time time supply drivers, supply driver helpers, and supply shuttle drivers employed by the Employer at its Summer St., South Boston, Massachusetts, facility, but excluding all other employees, managers, guards, and supervisors as defined in the Act.

(n) Unilaterally failing to grant an annual wage increase.

(o) Unilaterally granting an annual wage increase.

(p) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra, and Sean Brennan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra, and Sean Brennan for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Reimburse Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra, and Sean Brennan, for all search-for-work and interim-work-related expenses regardless of whether they received interim earnings in excess of those expenses during any particular quarter or during the overall backpay, as set forth in the remedy section of this decision.

(d) Compensate Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra, and Sean Brennan for the adverse tax consequences, if any of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoffs of Kerby Chery, Jason Cobbler, and Elton Ribeiro and the unlawful suspensions and discharges of Marco Becerra and Sean Brennan, and within 3 days thereafter notify them in writing that this has been done and that the unlawful layoffs, suspensions and discharges will not be used against them in any way.

(f) On request, bargain with the Union as the exclusive representative of the employees in the unit described above, from September 28, 2015, concerning terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement.

(g) Make whole employees in the bargaining unit who suffered any loss in wages caused by the Respondent's unlawful failure to implement the annual wage increase in December 2015, with interest, as provided in the remedy section of this decision.

(h) On the specific request of the Union, rescind the wage increase granted in May 2016, and bargain regarding the granting of the annual wage increase to unit employees.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Boston, Massachusetts, copies of the attached notice marked "Appendix."[51] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 2015.

(k) During the time that the notice is posted, convene the unit employees during working time at the Respondent's Boston, Massachusetts facility, and have Carlos DeAndrade read the attached notice to the assembled employees, or permit a Board agent, in the presence of Carlos Carlos DeAndrade, to read the notice to employees.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

51 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., November 4, 2016.

Mark Carissimi

Mark Carissimi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT solicit grievances and impliedly promise to remedy them in order to discourage employees' support for the International Brotherhood of Teamsters, Local 25 (the Union), or any other union.

WE WILL NOT interrogate employees regarding their union activity.

WE WILL NOT threaten employees with a loss of direct access to us if they select the Union as their bargaining representative.

WE WILL NOT inform employees of the futility of selecting the Union as their bargaining representative.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT offer employees transfers, raises, and promotions in order to discourage them from supporting the Union.

WE WILL NOT attribute the loss of a wage increase to the Union.

WE WILL NOT interrogate employees about a NLRB subpoena.

WE WILL NOT grant benefits to employees by improving the efficiency of our warehouse, delivery routes, and truck loading, and assist employees in the performance of their duties, in order to discourage them from supporting the Union.

WE WILL NOT layoff, suspend, or discharge employees because of their union activity.

WE WILL NOT withhold an annual wage increase from employees in order to discourage them from supporting the Union.

WE WILL NOT grant an annual wage increase to employees in order to discourage them from supporting the Union.

WE WILL NOT fail to recognize and bargain with the Union, since September 28, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time time supply drivers, supply driver helpers, and supply shuttle drivers employed by the Employer at its Summer St., South Boston, Massachusetts, facility, but excluding all other employees, managers, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally fail to grant an annual wage increase.

WE WILL NOT unilaterally grant an annual wage increase.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra, and Sean Brennan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra, and Sean Brennan for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL reimburse Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra and Sean Brennan, for all search-for-work and interim-work-related expenses regardless of whether they received interim earnings in excess of those expenses during any particular quarter or during the overall backpay, with interest.

WE WILL compensate Kerby Chery, Jason Cobbler, Elton Ribeiro, Marco Becerra, and Sean Brennan for the adverse tax consequences, if any of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Kerby Chery, Jason Cobbler, and Elton Ribeiro and the unlawful suspensions and discharges of Marco Becerra and Sean Brennan, and within 3 days thereafter notify them in writing that this has been done and that the unlawful layoffs, suspensions and discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the unit described above, from September 28, 2015, concerning terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement.

WE WILL make whole employees in the bargaining unit who suffered any loss in wages caused by our unlawful failure to implement the annual wage increase in December 2015, with interest.

WE WILL, on the specific request of the Union, rescind the wage increase granted in May 2016, and bargain regarding the granting of the annual wage increase to unit employees.

W.B. MASON CO., INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, 6th Floor, Boston, MA 02222–1072

(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-161120 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6701.